

MILITARY LAW REVIEW VOL. 60

Articles

PROBABLE CAUSE AND THE INFORMER
PLAIN VIEW SEARCHES

Comments

ABSOLUTE LIABILITY UNDER THE FEDERAL TORT CLAIMS ACT
SURVEILLANCE FROM THE SEAS

Perspective

THE EVOLVING LAWS OF ARMED CONFLICT
CIVILIZATION OF MILITARY JUSTICE: GOOD OR BAD?

Book Review



MILITARY LAW REVIEW

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MILITARY LAW REVIEW — VOL. 60

Page

Articles:

| | |
|--|----|
| Probable Cause and the Informer Major Francis A. Gilligan | 1 |
| Plain View Searches Captain John Rintamaki | 25 |

Comments:

| | |
|--|----|
| Absolute Liability Under the Federal Tort Claims Act Major Fred K. Morrison | 53 |
| Surveillance From the Seas Lieutenant Commander Robert E. Coyle | 75 |

Perspective:

| | |
|--|------------|
| The Evolving Laws of Armed Conflict Professor R. R. Baxter | 99 |
| Civilianization of Military Justice: Good or Bad? Professor Delmar Karlen | 113 |
| Book Review | 123 |

1949-1950

1949-1950
1950-1951
1951-1952

1952-1953 1953-1954 1954-1955

1955

1956

1957

1958

1959

1960

1961

1962

1963

1964

1965

1966

1967

1968

1969

1970

1971

PROBABLE CAUSE AND THE INFORMER*

By Major Francis A. Gilligan**

Both lead articles in this issue examine the often litigated fourth amendment protection against unreasonable searches and seizures. Major Gilligan examines the evolving law of informant reliability giving particular emphasis to recent Supreme Court and Court of Military Appeals' decisions. Captain Rintamaki surveys the "plain view" rule in military and civilian practice.

I. INTRODUCTION

Both the Supreme Court¹ and the Court of Military Appeals² have expressed a preference for searches authorized by a magistrate. In the military a military judge or a commanding officer takes the place of the magistrate. Perspective in this area may be gained by recognizing three ways in which information as to criminal activity may reach the magistrate. One, in the rare case, he may personally observe criminal activity or its fruits. Two, he may personally confront the person who has seen the criminal activity or evidence of its fruits. In the civilian context this person will typically be a police officer. In the military a CID agent or merely a member of the commander's unit may be the informer. Three, the person directly confronting the magistrate is basing his evidence about criminal activity or its fruits wholly or in part on information obtained from third parties who are not present before the magistrate. These parties may or may not be identified.

Throughout the area two concerns are present: 1) is the evi-

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¹ See, e.g., *Coolidge v. New Hampshire*, 403 U.S. 448 (1971); *Chimel v. California*, 395 U.S. 752, 763 (1969); *Katz v. United States*, 389 U.S. 347, 357 (1967).

² See, e.g., *United States v. Jeter*, 21 U.S.C.M.A. 208, 44 C.M.R. 262 (1972); *United States v. Sparks*, 21 U.S.C.M.A. 134, 44 C.M.R. 158 (1971).

60 MILITARY LAW REVIEW

dence given to the magistrate worthy of belief, and 2) if true, does it lead to the reasonable belief that items connected with criminal activity are "located in the place or on the person to be searched."³ In the first situation (magistrate personally observing) the magistrate merely relies on his own powers of observation and deductive abilities. In the second situation, when the informant personally appears, his credibility is subject to the personal scrutiny of the magistrate. Reviewing courts usually defer to his assessment of the credibility of the informant.⁴ In the third situation, where the magistrate is not personally facing the informant, hearsay is being used to establish probable cause. Where this method is relied upon, the Manual, drawing upon the Supreme Court opinion in *Aguilar v. Texas*,⁵ requires that the person requesting search authorization inform the commanding officer or the military judge of "some of the underlying circumstances from which the informant concluded that the items in question were where he claimed they were and some of the underlying circumstances from which the authority requesting permission to search concluded that the informant, whose identity need not be disclosed, was credible or his information reliable."⁶

This third area poses the greatest difficulty for magistrates and reviewing courts. Here the magistrate is not able to rely on direct confrontation of the informant. In some cases mere questions of convenience may keep the informant away from the magistrate. A policeman will typically find it easier to report a telephone

³ Para. 152, *MANUAL FOR COURTS-MARTIAL*, 1969 (REV. ED.) [hereinafter cited as MCM 1969 (REV.)]. Before the magistrate authorizes a search of a person or place, it is not necessary to show that the person to be apprehended or the person whose premise is to be searched committed a crime. *Compare Article 7b, UNIFORM CODE OF MILITARY JUSTICE, WITH Para. 152, MCM, 1969 (REV.)*. See also *United States v. Jeter*, 21 U.S.C.M.A. 208, 44 C.M.R. 262 (1972); *People v. Meaderds*, 171 N.E. 2d 638 II. (1969).

⁴ See, e.g., *United States v. Smallwood*, ____ U.S.C.M.A. ___, ____ C.M.R. ____ (1972) (The commanding officer "was also able to assess the informant's credibility from his demeanor in direct confrontation."); *People v. Coleman*, ____ Cal. App. 2d ___, 104 Cal. Rptr. 363 (The question of reliability is not involved when the informant himself personally signs the affidavit and appears before the magistrate. In such a case the magistrate determines reliability as would be the case of the trier of fact in court.); *People v. Wheatman*, 29 N.Y. 2d 347, 327 N.Y.S. 2d 643 (1971).

⁵ 378 U.S. 108, 114 (1964). *Aguilar's* conviction followed a search based on a warrant which recited only:

Affiants have received reliable information from a credible person and do believe that heroin, marijuanna, barbiturates and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law. *Id* at 109.

The affidavit on which the warrant was based was held insufficient.

⁶ Para. 152, MCM, 1969 (REV.).

INFORMANTS

company official's verification of a phone number than to bring the official himself before the judge. In other situations, however, information will be coming from persons closely associated with the criminal activity. They may provide their information out of fear, in a desire for revenge or in hopes of bettering their own questionable position with the police.

This article will examine the use of the informant in the criminal law. Of particular concern will be the way in which the two-pronged test of the Manual can be satisfied.

The two-pronged test adapted from *Aguilar v. Texas*,⁷ may be broken down into its component parts. That portion providing that the magistrate be informed of "some of the underlying circumstances from which the informant concluded that the items in question were what he claimed they were"⁸ will be called the "basis of knowledge test." The other portion⁹ will be called the "reliability test."

Two of the most significant cases in this area are *Spinelli v. United States*¹⁰ and *Draper v. United States*.¹¹ In *Spinelli*, a search warrant for gambling paraphernalia was obtained on the basis of an affidavit which indicated: (1) the defendant had been observed on several occasions going to a certain apartment; (2) a check with the telephone company disclosed that there were two telephones in this apartment listed in the name of another person; (3) the defendant was "known to this affiant and to federal law enforcement agents and local law enforcement agents as a bookmaker";¹² and (4) the affiant had been "informed by a confidential reliable informant that [the defendant] is operating a handbook and accepting wagers and disseminating wagering information by the means of the telephones"¹³ located in the specified apartment. Mr. Justice Harlan, speaking for the majority of the Court, stated that "[T]he first two items reflected[ed] only innocent-seeming activity and data."¹⁴ He went on to say that the third allegation (defendant's reputation as a gambler) was

⁷ 378 U.S. 108 (1964).

⁸ Para. 152, MCM, 1969 (REV.).

⁹ *Id.* "(S)ome of the underlying circumstances from which the authority requesting permission to search concluded that the informant, whose identity need not be disclosed, was credible or his information reliable."

¹⁰ 393 U.S. 410 (1969). "While *Draper* involved the question whether the police had probable cause for an arrest without a warrant, the analysis required for an answer to this question is basically similar to that demanded of a magistrate when he considers whether a search warrant should issue." *Id.* at 417 n. 5.

¹¹ 358 U.S. 307 (1959).

¹² *Spinelli v. United States*, 393 U.S. 410, 414 (1969).

¹³ *Id.*

¹⁴ *Id.*

"but a bald and unilluminating assertion of suspicion that is entitled to no weight in appraising the magistrate's decision."¹⁵ The fourth allegation (the informant's tip), he stated, did not pass either prong of *Aguilar*. In contrast, he stated, the tip in *Draper* did.¹⁶ There, the FBI informant who had been reliable in the past (1) informed the FBI on the 7th of September that Draper would arrive in Denver on a train from Chicago on the 8th or 9th of September, (2) described Draper's appearance and how he would be dressed, (3) stated that the defendant walked with a fast gait, (4) stated that he would be carrying a tan zipper bag, and (5) stated he would be carrying heroin. The Court held that the apprehending officer had probable cause to apprehend the defendant when he corroborated four of the five allegations prior to the defendant's arrest.¹⁷ In reconciling these cases it is necessary to break down *Aguilar* into the basis of knowledge test and the reliability test.

II. THE BASIS OF KNOWLEDGE TEST

The basis of knowledge test demands that the informer have obtained his knowledge in a reliable way such as by direct observation, admissions by the defendant or coaccused, through conclusions drawn from circumstantial evidence, or through information given to the informer by another who was reliable and in a position to know.¹⁸ Absent one of these sources of information, the basis of knowledge test may be satisfied "(i)n the absence of a statement detailing the manner in which the information was gathered"¹⁹ provided the accused's criminal activity is described in sufficient detail so that the magistrate may know that he is relying on something more substantial than a casual rumor.²⁰ In *Spinelli*, Mr. Justice Harlan offered little guidance for determining when a tip is detailed enough to be self-verifying. How-

¹⁵ *Id.*

¹⁶ *Id.* at 419.

¹⁷ *Draper v. United States*, 358 U.S. 307 (1959).

¹⁸ *Spinelli v. United States*, 393 U.S. 410, 423-25 (1969) (Justice White, concurring opinion).

¹⁹ *Id.* at 416.

²⁰ *Id. See also Boyer v. Arizona*, 455 F.2d 804, 806 (9th Cir. 1972). ("Even absent a clear statement of the method by which the informer gathered his information, the information covered Boyer's criminal activity in sufficient detail that the magistrate could 'know that he [was] relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation'"; *United States v. Archuleta*, 446 F.2d 518, 520 (9th Cir. 1971).

INFORMANTS

ever, he did say that the *Draper* case provided a "suitable benchmark" to indicate when the tip is sufficiently detailed.²¹

It can be seen in comparing *Spinelli* and *Draper* that the number of facts alleged is not the criterion²² to use in determining whether the tip is self-verifying enough to pass the basis of knowledge test. The tip from the informant will be held to be self-verifying when the tip is so detailed that it is "arguable that . . . it was the informant himself who has perceived the facts, for the information reported is not usually the subject of casual, day-to-day conversation."²³ Another criterion is the detail of the facts alleged. Mr. Justice White stated that where an informant "with whom an officer has had satisfactory experience states that there is gambling equipment in the living room of a specified apartment and describes in detail not only the equipment itself but the appointments and furnishings in the apartment," the tip will be held to be sufficiently self-verifying to pass the basis of knowledge test.

It is arguable that such detail should not be determinative if the facts alleged relate to "neutral circumstances."²⁴ Certainly, the inference that the informer obtained his information by personal observation is greatly strengthened if the detail in the tip relates to criminal activity. Even so, such a tip would not guard against a detailed lie. Such protection can be obtained by corroboration of criminal activity. However, *Draper* indicates that the detail need not relate to criminal behavior in order to be self-verifying. Whatever criterion is used does not alleviate the requirement that the tip must contain some of the underlying circumstances to show that the information is credible or the informant reliable. Whether the Court of Military Appeals will hold that the basis of knowledge test is satisfied when the tip is as detailed as *Draper* but does not relate to criminal activity is open to question. Since the overall question relates to reliability, a tip should be held to be self-verifying if the details indicate that the information was obtained in a reliable manner.²⁵ Another means of passing the basis of knowledge test is by corroboration.²⁶

²¹ *Spinelli v. United States*, 393 U.S. 410, 416 (1969).

²² See notes 12-13, 17, *supra*, and accompanying text.

²³ *Spinelli v. United States*, 393 U.S. 410, 426 (1969) (Justice White, concurring).

²⁴ *United States v. Weshenfelder*, 20 U.S.C.M.A. 416, 43 C.M.R. 256 (1971).

²⁵ *Spinelli v. United States*, 393 U.S. 410, 425 (1969) (Justice White, concurring).

²⁶ See notes 80-131, *infra*, and accompanying text.

60 MILITARY LAW REVIEW

RELIABILITY TEST

The reliability test guards against tips provided by untruthful or unreliable informers. This test speaks of two possibilities: (1) a "credible" informant, or (2) "reliable" information. This distinction suggests that an informant is credible if he has provided truthful tips in the past and that the information is reliable if corroborated by independent investigation. In establishing reliability or credibility, a mere assertion that the information was obtained from "a confidential, reliable informant" is a "bald and unilluminating" statement which does not pass the reliability test.²⁷ Nor is it sufficient to state that the informant is a "prudent person."²⁸ Citing *Jones v. United States*²⁹ some courts have stated that an assertion that the informer has given truthful tips on prior occasions is sufficient to establish credibility.³⁰

In *Jones* the affiant stated that the informant had previously given him reliable information.³¹ The affiant also related that Jones had "admitted to the use of narcotic drugs and display(ed) needle marks as evidence of same"³² and that "(t)his same information"³³ regarding the accused had been given the narcotic squad by "other sources of information."³⁴ Other courts have held that merely stating that the informant has given reliable information in the past is not setting forth "some of the underlying circumstances" from which the officer concluded the informant is reliable.

In *Hooper v. Commonwealth*³⁵ two affidavits were presented for the court's consideration. One recounted facts from a participant in a burglary as to where the stolen items were kept. This was held sufficient under *Aguilar*. The other reported narcotics being kept according to "a reliable source of information that

²⁷ *Spinelli v. United States*, 393 U.S. 410, 414 (1969).

²⁸ *Harris v. United States*, 403 U.S. 573 (1971).

²⁹ 362 U.S. 257, 270 (1960).

³⁰ *People v. McNeil*, ___ Ill. 2d ___, 288 N.E. 2d 464 (1972); *People v. Hendricks*, 25 N.Y.2d 129, 133-34, 303 N.Y.S.2d 33, 36-37 (1969); *People v. Montague*, 19 N.Y.2d 121, 122, 278 N.Y.S.2d 372, 374 (1967). See also *United States v. Malo*, 417 F.2d 1242 (2d Cir. 1969) (The tip was held sufficient to pass reliability test where it was shown the informant had given reliable information in the past. Alternatively, there was corroboration of noncriminal behavior furnished the police by the informant.); *United States v. Gazard Colon*, 419 F.2d 120 (2d Cir. 1969) (Informant is deemed reliable if he has given arresting officer "at least six tips—three of which had led to arrest").

³¹ *Jones v. United States*, 362 U.S. 257, 267-70 (1960).

³² *Id.* at 267, note 2.

³³ *Id.*

³⁴ *Id.*

³⁵ ___ S.E.2d ___, 212 Va. 49 (1971).

INFORMANTS

has given information in the past, that has resulted in arrest being made for narcotics violation."³⁶ This was held insufficient as not presenting adequate underlying facts by which to evaluate the tip.

The Colorado Supreme Court held an affidavit invalid which stated that a reliable informer who gave accurate information in the past had purchased LSD from the subject and was to do so again on the day the warrant was sought.³⁷ The court stated:

(A)n affidavit established the credibility of informant by merely stating that the informant is known to be reliable based on past information supplied by the informer which has proven to be accurate. Although the words "past information" might conjure up in the mind of the officer some knowledge of the underlying circumstances from which the officer might conclude that the informant was reliable, the judge has not been apprised of such facts, and consequently, he cannot make a disinterested determination base on such facts.³⁸

The import of this decision is that if it is the judge who is to determine probable cause, he must know more than the fact that the informer has provided reliable information in the past.³⁹ What position the Court of Military Appeals will take is uncertain. Many cases have avoided the issue⁴⁰ or have relied not only on the "proven reliability" of the informant but also on other factors, for example, corroboration or declarations against interest to support the passing of the reliability test.⁴¹ The most recent decision to deal with this issue is *United States v. Lidle*.⁴² In *Lidle* the agent testified that the informant had provided infor-

³⁶ *Id.* at 51.

³⁷ *People v. Brethauer*, 482 P.2d 369 (Colo. 1971).

³⁸ *Id.* at 373.

³⁹ See also *Wiles v. Commonwealth*, 209 Va. 282, 163 S.E.2d 595 (1968). (In holding the affidavit insufficient, the court stated "there is no statement of underlying circumstances supporting affiant's conclusion that the information is credible, other than that he has given reliable information in the past."); *Sturgeon v. State*, 483 P.2d 335 (Okla. 1971) (The court expressed satisfaction which indicated only that the informant had proven reliable in the past by stating "[t]he affidavit must detail why the informant is deemed reliable . . . the affidavit in the instant case recites . . . no details as to why the informant is deemed reliable which would enable the magistrate to judicially determine whether the informant was in fact reliable."); *Id.* at 337; *Horner v. State*, 483 P.2d 744 (Okla. 1971); *Leonard v. State*, 453 P.2d 257 (Okla. 1969); *State v. Holloway*, 187 Neb. 1, 187 N.W.2d 85 (1971).

⁴⁰ *United States v. Clifford*, 19 U.S.C.M.A. 391, 41 C.M.R. 391 (1970).

⁴¹ *United States v. Miller*, 21 U.S.C.M.A. 92, 44 C.M.R. 146 (1971); *United States v. Bunch*, 19 U.S.C.M.A. 309, 41 C.M.R. 309 (1970); *United States v. Goldman*, 18 U.S.C.M.A. 389, 40 C.M.R. 101 (1969); *United States v. Ness*, 18 U.S.C.M.A. 18, 23, 32 C.M.R. 18, 23.

⁴² 21 U.S.C.M.A. 455, 45 C.M.R. 229 (1972).

60 MILITARY LAW REVIEW

mation concerning other individuals which had been confirmed by "two other sources, one of which was a policeman in the local area."⁴³ In addition the informant had made a purchase of marijuana from the accused approximately two weeks prior to the search in question.⁴⁴ The Court stated that the informant "was not an unnamed member of the underworld but a known, reputable member of the authorizing officer's command."⁴⁵ His "reliability was satisfactorily established . . . [by] having made a controlled purchase and of his having provided other information that had been confirmed."⁴⁶ It would seem as though this case is correct, since the investigator provided more than the bald statement that the informant has proven reliable in the past. Such information would serve as a basis to test the information given to the military judge⁴⁷ or commanding officer.

In the third part of plurality opinion in *United States v. Harris*,⁴⁸ Chief Justice Burger indicated that "there was an additional reason for crediting the informant's tip."⁴⁹ The additional reason was the informant's declaration against penal interest,⁵⁰ that is, that he had purchased illicit whiskey from the accused over a long period of time and in fact had bought whiskey within the last two weeks. This statement by the informant by "itself and without more . . . furnished probable cause to search" the accused's premises.⁵¹ The Court of Military Appeals has also decided in dictum that a declaration against interest may be sufficient to establish that the informer is credible.⁵²

⁴³ *Id.* at 457, 45 C.M.R. 231.

⁴⁴ *Id.*

⁴⁵ *Id.* See also notes 35-47, *supra*, and accompanying text.

⁴⁶ *Id.*

⁴⁷ Comment, THE ARMY LAWYER 4 (August 1972).

⁴⁸ 403 U.S. 573 (1971). Justices Black, Blackmun and White concurred in this part of the opinion.

⁴⁹ *Id.* at 583.

⁵⁰ 26 U.S.C. § 5205(a)(2).

⁵¹ *United States v. Harris*, 403 U.S. 573, 584 (1971).

⁵² *United States v. Clifford*, 19 U.S.C.M.A. 391, 398, 41 C.M.R. 391, 393 (1970) ("We do not doubt the credibility of the confidants . . . or the reliability of the information obtained from them. . . . Because these reports [the statements of the three informers implicating the accused in marijuana dealings] were against the interests of the makers, we are *inclined* to believe them." Emphasis added); *United States v. McFarland*, 19 U.S.C.M.A. 356, 359, 41 C.M.R. 356, 359 (1970) (Where the informant has voluntarily implicated himself in a serious offense at a time when he was not known to have engaged in any sort of misconduct, "(T)he inference of truthfulness certainly has appeal, but we need not decide whether it would alone be sufficient to impart reliability . . ."); *United States v. Goldman*, 18 U.S.C.M.A. 389, 392, 40 C.M.R. 101, 104 (1969) ("Where 'the informer's hearsay comes from one of the actors in the crime in the nature of an admission against interest, the affidavit giving this information should be

INFORMANTS

Whether a declaration against interest by an informer satisfies the reliability test must be determined in light of whether the information can be considered reliable. Before a declaration against penal interest should be considered, it must be examined to see whether it is truly against the informer's interest and that the informer has no motive to falsify the facts declared.⁵³ In supporting his statement in *Harris*, Chief Justice Burger relied upon the Proposed Rules of Evidence for the United States Courts and Magistrates, Rule 804. However, it must be kept in mind that these rules would carefully limit the admissibility of declarations against penal interest when the informer is not available for cross-examination.⁵⁴

As stated in *United States v. McFarland*⁵⁵ whether a declaration against interest would be considered sufficient to establish reliability depends on whether the accused is under charges or undergoing an investigation. If so, the accused, especially in a narcotics case, is motivated to give additional information to receive an offer of immunity or a sentence reduction. Assuming the government decides to give the informant a grant of immunity or a reduction in sentence by means of a pretrial agreement, the information received is usually not reliable or is of such general nature that all the individuals in the informant's unit have heard rumors to the same effect.⁵⁶ Secondly, the informant may be motivated by the promise of payments. This factor is more prevalent in narcotic cases than in any other area.⁵⁷ However, the motive for falsification is not as great in

held sufficient." citing *Spinelli v. United States*, 393 U.S. 410, 425, J. White concurring.)

⁵³ See C. MCCORMICK, THE LAW OF EVIDENCE, § 256 (1954).

⁵⁴ Proposed Rules of Evidence for the United States Courts and Magistrates, Rule 804 is as follows: "A statement which . . . at the time of its making . . . so far kindered to subject . . . [the informer] to civil or criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true [will be admissible]. This exception does not include a statement or confession against the accused in a criminal case, made by the codefendant or other person implicating both himself and the accused." However, rule 804 is not intended to apply to probable cause hearings. Proposed Rule 1101(d)(3).

⁵⁵ 19 U.S.C.M.A. 356, 41 C.M.R. 356 (1970); see also *In re Boykin*, 39 Ill.2d 617, 297 N.E.2d 460 (1968).

⁵⁶ *United States v. Conway*, 20 U.S.C.M.A. 99, 42 C.M.R. 291 (1970) (Where the witness reasonably believed that the benefits he was to obtain under the agreement were dependent upon his testifying in accordance with his pretrial statement, he will be held to be an incompetent witness.); *United States v. Stoltz*, 14 U.S.C.M.A. 461, 34 C.M.R. 241 (1964) (Witness incompetent where grant of immunity conditioned on testimony at trial that is in accord with his pretrial declarations).

⁵⁷ See S. DRODSKY, SEARCH WARRANTS, HEARSAY EVIDENCE IN THE FEDERAL CONSTITUTION: A CRITIQUE BASED ON CALIFORNIA EXPERIENCE, 35

60 MILITARY LAW REVIEW

non-narcotic cases dealing with a person not known to have been engaged in any misconduct.⁵⁸

Another factor to consider in determining reliability is the relation of the informant to criminal activity. The civilian courts have held that the identified victim of a crime is presumed to be reliable.⁵⁹ To require a showing of reliability would create an impossible standard since "(M)ost victims of crime are total strangers to arresting officers"⁶⁰ Similarly, there is no requirement to show the reliability of an identified bystander.⁶¹ Some courts have stated that even an anonymous victim is presumed to be reliable.⁶² In *In re Boykin*⁶³ a search was based on an anonymous telephone call to a high school principal stating that a student had a gun. In upholding the search the court distinguished this from the typical informant case:

(The police) knew only what they had been told, and they were not required to delay until they had ascertained whether the informant was in fact anonymous or whether the assistant principal said that he (sic) was in order to avoid future difficulties in the school and the creation of a feud In this case, moreover, there is a complete absence of any possible element of gain to an anonymous informant from furnishing false information, and the nature of the potential danger differs from that involved in the gambling and narcotics cases.⁶⁴

The Court of Military Appeals has not followed the line of cases that hold identified victims and bystanders presumptively reliable. In *United States v. Herbert*,⁶⁵ the driver of a vehicle

(1969) (The California Municipality studied by the author averaged \$10.00. This amount was generally used to finance the informant's drug habit.); *Jones v. United States*, 266 F.2d 924, 928 (D.C. Cir. 1959). See also Note, *The Outwardly Sufficient Search Warrant Affidavit*, 19 U.C.L.A. L. REV. 96 (1971).

⁵⁹ *United States v. Davenport*, 14 U.S.C.M.A. 152, 159, 33 C.M.R. 364, 371 (1963) (C.J. Quinn, dissenting). See also note 79, *infra*, and accompanying text.

⁶⁰ *United States v. Bell*, 457 F.2d 1231 (5th Cir. 1972); *Pendergast v. United States*, 416 F.2d 776 (2d Cir. 1969).

⁶¹ *Pendergast v. United States*, 416 F.2d 776, 785 (2d Cir. 1969).

⁶² *United States v. Bell*, 457 F.2d 1231 (5th Cir. 1972).

⁶³ *Brown v. United States*, 365 F.2d 976 (D.C. Cir. 1966). "That the information came from an unknown victim of the crime did not preclude the policeman's having probable cause to arrest Appellant on the basis of it. Although the police could not here judge the reliability of the information on the basis of past experience with the informant . . . the victim's report has the virtue of being based on personal observation . . . and is less likely to be colored by self-interest than is that of an informant." (Majority opinion written by now Chief Judge Burger). *Id.* at 979.

⁶⁴ 39 Ill.2d 617, 237 N.E.2d 460 (1968).

⁶⁵ *Id.* at 461-62.

⁶⁶ *United States v. Herberg*, 15 U.S.C.M.A. 247, 35 C.M.R. 219 (1965).

INFORMANTS

reported to the military police that he had been run off the road by an automobile driver later identified as the accused. After stating that "(t)he fact that the complaint was not sworn to, corroborated, or verified does not vitiate the existence of probable cause." ⁶⁸ The Court stated:

Here the complainant was the victim and not an unidentified informant It is recognized that complaints registered by actual victims of offenses, unlike the reports of unidentified informers, do not require the same corroboration⁶⁹

This language rejects the approach that an anonymous informer is presumed reliable.⁷⁰ Beyond that, it seems to require some corroboration of the known victim's report. As the Court again stated in *United States v. Alston*,⁷¹ "Where a victim reports an offense, less corroboration than would otherwise be needed may satisfy probable cause requirements."⁷² The reluctance on the part of the Court to apply the presumption was evidenced in *United States v. Brown*.⁷³

In *Brown*, the accused's company commander had been informed by the company commander of B Company that "two of his people had reported" to him that the accused had Jackson's amplifier in his hootch. B Company's commanding officer also informed the accused's company commander that Jackson was "one of his better" and "more reliable people." At the accused's company commander's request, Jackson came to see him. Jackson advised the accused's commanding officer that a "good friend of his" had been asked by the accused to help him hook up an amplifier which he had just acquired but was not sure how to install. The friend went to the accused's quarters. Previously, he had borrowed Jackson's amplifier and had "used it for some reasonable period." Based on the time he had borrowed this amplifier, he could identify it by its distinguishing characteristics. After the accused's commanding officer had obtained this information from Jackson and had learned that Jackson's friend saw the victim's amplifier in his hootch, he went to the accused's hootch and seized the amplifier. The Court held that since Jackson's friend had previously borrowed the amplifier, it appears by fair implication that this amplifier had been returned. Thus, the accused's company commander "had before him not only the

⁶⁸ *Id.* at 250, 35 C.M.R. at 222.

⁶⁹ *Id.*

⁷⁰ See notes 59-61, *supra*, and accompanying texts.

⁷¹ 20 U.S.C.M.A. 581, 44 C.M.R. 11 (1971).

⁷² *Id.* at 583, 44 C.M.R. at 13.

⁷³ 21 U.S.C.M.A. 522, 45 C.M.R. 296 (1972).

60 MILITARY LAW REVIEW

inference that good friends were not likely to lie to one another in a situation as serious as the theft of expensive property, but evidence of past conduct by a friend indicative of trustworthiness and reliability." ⁷² The report of Jackson's friend was at least inferentially confirmed by Jackson himself. The Court concluded that "these circumstances provided substantial support for . . . [the accused's commanding officer's] conclusion that Jackson's friend, although unnamed, was worthy of belief." ⁷³ Judge Darden dissented stating that the information from an unknown source where such information is not corroborated is insufficient to establish probable cause for search. It might have been more persuasive for the Court in this case to conclude that the reliability of Jackson's friend was presumed unless there was evidence that he was engaged in other misconduct.⁷⁴

The reluctance of the Court to rely on the presumption of reliability where the victim or eye-witness is a contemporary of the accused has a factual basis formed in the military setting. The victim or eye-witnesses in the civilian cases did not know the accused, hence there was no motive for falsification. In the military, the victim or eye-witness who is a contemporary of the accused may furnish false information because of a petty jealousy or for the sake of revenge. This is especially true in the context of an individual in a small unit where the first sergeant makes recommendations as to who should receive weekend passes and who will serve on the various work details, some being more desirable than others.

However, the presumption of reliability will be applied where the informant is in the military but not a contemporary of the accused. In *United States v. Smallwood*,⁷⁵ the accused was convicted of the wrongful possession of marijuana and opium obtained from the accused's person and quarters as the result of a search authorized by his commanding officer. The accused's commanding officer had received information from two individuals. The first individual, a captain, had been in Vietnam nine days. On the day of the search, the captain, who had been working in the same area as the accused for three days, observed the

⁷² *Id.* at 524, 45 C.M.R. at 298.

⁷³ *Id.*

⁷⁴ *Cf. United States v. Gibbins*, 21 U.S.C.M.A. 556, 45 C.M.R. 330, 333 (1972). Information from unidentified participants in a drug amnesty program that the accused is "the contact or the pusher" . . . unaccompanied by any facts illustrative of the reliability of the informants or facts showing the means by which the informants gained the knowledge about the illegal activity" is insufficient to meet the requirements of *Aguilar*.

⁷⁵ ___ U.S.C.M.A. ___, ___ C.M.R. ___ (1972).

INFORMANTS

accused smoking a cigarette with a rolled or crimped end. Moments later, he approached the accused who was now seated in the cab of a truck. He noticed the accused rolled the end of the cigarette between his fingers before he smoked it. The captain thought the accused was smoking marijuana since the smell of the smoke was sweet. Although admitting he was no expert, "He testified that he had previously smelled marijuana smoke, apparently in demonstrations by the CID."⁷⁶ The captain reported his observations to the noncommissioned officer in charge of the accused, who related the information to the first sergeant and then to the commanding officer. The Court unanimously upheld the search of the *person* on the basis of the information from the captain who had worked in the same area as the accused for three days. Judge Quinn stated "that the relationship between the captain and the accused was not likely to be one that would incline the captain falsely to report the accused as involved in serious misconduct. Moreover . . . his report . . . was an official report for the purpose of initiating appropriate official action."⁷⁷ Likewise, Chief Judge Darden concurring stated that "the report of an officer, transmitted through usual channels to the commanding officer of the accused, that he was actually observed the accused commit an offense is sufficient to serve as a basis for the commanding officer's apprehension of the accused."⁷⁸

Lastly, the type of crime which forms the basis of the tip is a factor to be weighed in determining the reliability of the informant. The potential danger of false information is greater in gambling and narcotics cases where the informant is more likely to be from the criminal milieu than in a fraud or assault case.⁷⁹

IV. CORROBORATION

In *Spinelli*,⁸⁰ Mr. Justice Harlan indicated that independent corroboration may satisfy both the basis of knowledge test and

⁷⁶ *Id.* at __, __ C.M.R. __.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Compare *In re Boykin*, 39 Ill.2d 617, 237 N.E.2d 460 (1968), with *United States v. Sultan*, 463 F.2d 1066 (2d Cir. 1972); *United States v. Williams*, __ C.M.R. __ (NCMR 1972). See also *Jaben v. United States*, 381 U.S. 214, 224 (1965) (Mr. Justice Harlan noted that "unlike narcotics informants . . . whose credibility may often be suspect, the sources in this tax evasion case are much less likely to produce false or untrustworthy information."); *United States v. Ventresca*, 380 U.S. 102, 111 (1965) (FBI agents are presumed to be reliable.).

⁸⁰ *Spinelli v. United States*, 393 U.S. 410 (1969).

60 MILITARY LAW REVIEW

the reliability test.⁸¹ Although this is the converse of what was stated,⁸² it seems to be supported by other language in the opinion.⁸³ In determining whether the tip has been sufficiently corroborated, Justice Harlan used *Draper*⁸⁴ as a relevant standard of comparison.⁸⁵ In *Draper*, the apprehending officer had corroborated four of the five allegations prior to the defendant's arrest.⁸⁶ However, in *Spinelli* "one small detail" (the presence of two phones) had been corroborated by independent investigative efforts,⁸⁷ and that fact revealed "nothing unusual"⁸⁸ since "(m)any a householder indulges himself in this petty luxury."⁸⁹

In comparing *Draper* with *Spinelli*, the question arises as to whether the criteria for corroboration is the number of facts verified or the nature of the facts contained in the informant's tip which are verified. Or, might the quantity or nature of the verified facts in the tip deemed to establish probable cause vary depending on how the informant obtained his information or whether there are some facts indicating his past reliability? In order to answer these questions we must turn to some recent military and civilian cases.

One of the more recent military cases on the subject is *United States v. Miller*.⁹⁰ In that case the accused's battalion commander was informed by two soldiers that a member of his unit possessed LSD. One soldier had furnished "similar reports" that the battalion commander had determined to be "true" but no seizures had been made because the law enforcement officials were "too late." The soldiers told the battalion commander that a person by the name of "Chief Miller," whom they described by his

⁸¹ This view seems to be accepted by the entire Court. See *Id.* at 438 (Fortas, J. dissenting). See also *United States v. Archuleta*, 446 F.2d 518 (9th Cir. 1971) (Corroboration of information in tip was sufficient to pass both prongs of test).

⁸² *Id.* at 415-16. "A magistrate cannot be said to have properly discharged his constitutional duty if he relies on an informer's tip which—even when partially corroborated—is not as reliable as one which passes Aguilar's requirements when standing alone."

⁸³ *Id.* at 415. "If the tip is found inadequate under Aguilar, the other allegations which corroborate the information contained in the hearsay report should then be considered. . . . Can it fairly be said that the tip, even when certain parts of it have been corroborated by independent sources, is as trustworthy as a tip which would pass Aguilar's test without independent corroboration?"

⁸⁴ *Draper v. United States*, 358 U.S. 307 (1959).

⁸⁵ *Spinelli v. United States*, 393 U.S. 410, 417 (1969).

⁸⁶ See note 17 and accompanying text.

⁸⁷ *Spinelli v. United States*, 393 U.S. 410, 417 (1969).

⁸⁸ *Id.* at 414.

⁸⁹ *Id.*

⁹⁰ 21 U.S.C.M.A. 92, 44 C.M.R. 146 (1971).

INFORMANTS

physical characteristics and as a cook who lived in the third floor of Bravo Company, was seen the night before with "over a hundred tablets" of LSD in a match box.⁹¹ Upon receiving this information, the battalion commander went to Company B where he talked with the first sergeant and was informed that a "cook assigned to the company bore the name of Miller; that this person was known as Chief Miller because of his Indian ancestry; that he had the same physical characteristics of the person described as the Chief Miller in the report he had received from the two soldiers; and that he occupied a room on the third floor of the barracks."⁹² The Court held that the battalion commander's "verification of significant details of the report" and the "proven reliability" of one of the informants was ample evidence to support a determination of probable cause to search the accused's person and his property.⁹³ The Court in reaching its conclusion that there was sufficient corroboration relied on the fact that four of the five "significant details" given to the battalion commander had been verified by his talk with the first sergeant. These four details were the name of the accused, his physical characteristics, his job, and the location of his living quarters. Although the Court might have relied upon this corroboration alone as passing the *Aguilar* test, it also relied on the fact that one of the informants had proven reliable in the past.

The Court held in *United States v. Weshenfelder*⁹⁴ that the corroboration of four "neutral circumstances" without an indication of proven reliability of the informant did not pass the two-pronged test. In that case, the accused was charged with violation of a general regulation by carrying a concealed weapon and storing ration cards in his desk in violation of another general regulation. The weapons charge resulted from the arrest of the accused in Saigon on the basis of information received by two agents of the Criminal Investigation Detachment from a previously unknown individual who stated that he was a sergeant first class and an intelligence agent.⁹⁵ This individual informed the agents that the accused and a specialist five were planning on selling some ration cards at a specified bar in Saigon. The informer, who stated he had obtained his information from an unidentified Vietnamese National, agreed to meet the agents in the bar and point out the accused and the specialist five. No

⁹¹ *Id.* at 93, 44 C.M.R. at 147.

⁹² *Id.*

⁹³ *Id.* at 94, 44 C.M.R. at 148.

⁹⁴ 20 U.S.C.M.A. 416, 43 C.M.R. 256 (1971).

⁹⁵ *Id.* at 418, 421, 43 C.M.R. at 257, 260.

60 MILITARY LAW REVIEW

effort was made by the agents to ascertain whether the information they obtained from the sergeant first class was reliable. The only facts contained in the informant's tip that were verified were the location of the bar, the fact the informer was sitting in the bar where he said he would be, the accused was there, and that a specialist five came from a back room in the bar and talked with the accused after the arrival of the CID agents. The Court held that the corroboration of these four innocent behavioral facts did not constitute probable cause for the arrest of the accused. It stated that the location of the bar is a "neutral circumstance as the bar was not off-limits and it was not known as a place where illegal activity had previously occurred." ¹⁹

In *United States v. McFarland*²⁰ the accused was convicted by general court-martial for the wrongful possession of marijuana. This charge arose out of a search of the accused at an air terminal on the West Coast. The information upon which the search was based was obtained from an informant who reported to the Air Force Base Dispensary for help in breaking his drug and marijuana habit. He told the attending physician that he wanted to talk to an agent of the Office of Special Investigations (OSI). On the basis of this request, an agent came and talked with the informer. The informer told the agent that two days prior to going to the dispensary, he had smoked marijuana with the accused and a Sergeant Goldstein. At this time, Sergeant Goldstein negotiated for a purchase of a large quantity of marijuana and LSD. Goldstein indicated that he was going to Hawaii on "leave in the near future," and was going to take the marijuana and LSD with him. The informant told the agent that earlier in the day the accused indicated that he was going to purchase some marijuana from Goldstein for his "personal use" and go to Hawaii with him. On the basis of this information, the OSI agent informed the passenger service officer at Travis Air Force Base of the expected departure of the accused and Sergeant Goldstein. Three days after being informed to be on the look-out for Goldstein and the accused, the passenger service officer phoned the agent and informed him that Goldstein had visited the passenger terminal and made arrangements for a stand-by ticket to go to Hawaii the next morning.

The agent, who received the phone call, called the base commander that evening and related to him what he had been told by the informer and the fact that Goldstein was scheduled to depart

¹⁹ *Id.* at 417, 43 C.M.R. at 261.

²⁰ 19 U.S.C.M.A. 356, 41 C.M.R. 356 (1970).

INFORMANTS

from Travis Air Force Base for Hawaii the next day. Acting on the agent's report, the base commander granted authorization to apprehend and search Goldstein if he appeared at the passenger terminal the next day. The base commander also recommended that the agent call him if the accused appeared at the terminal with Sergeant Goldstein so that he might authorize a search of the accused. The next morning the agent observed Goldstein and the accused at the passenger terminal. The accused had signed his name on a list for people requesting space available transportation to Hawaii. Upon gathering this information, the agent telephoned the base commander and informed him of the accused's presence at the terminal and his request for transportation to Hawaii. On the basis of this information, the commander authorized the search of the accused for marijuana and dangerous drugs. Upon receiving this authorization, the agents approached Goldstein and the accused and a search was made. The result of this search was the basis of the charge against the accused. The Court of Military Appeals held that the verification by the OSI agent of the "critical parts" ⁹⁸ of the informer's tip were sufficient to establish probable cause. Citing *Draper*, the Court stated: "Hearsay in an application for authority to search can be established as reliable by actions of the individual to be searched which conform to those predicted by the informant." ⁹⁹ The "critical parts" of the tip which the Court indicated had been verified by the agent were that both Goldstein and the accused indicated that they intended to go to Hawaii at some time "in the near future," and that both appeared at the passenger service terminal and requested transportation to Hawaii on the day of the search in question. The Court noted that although the agent's testimony indicated he gave strong credence to the informer's report because the informer had "voluntarily implicated himself in a serious offense," the Court indicated that the "inference of truthfulness certainly has appeal, but we need not decide whether it would alone be sufficient to impart reliability to [the informer's] report." ¹⁰⁰

The question of corroboration of the information contained in the informant's tip arose before the Supreme Court in *Harris v. United States*.¹⁰¹ However, the Court was only concerned with the reliability test and not with the basis of knowledge test. In *Harris* the informer told the federal tax investigator that he had pur-

⁹⁸ *Id.* at 359, 41 C.M.R. at 359.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ 403 U.S. 573 (1971).

60 MILITARY LAW REVIEW

chased bootlegged whiskey at the defendant's residence "for a period of more than 2 years, and most recently within the past 2 weeks."¹⁰² He also indicated that he had "personal knowledge that illicit whiskey is consumed by purchasers in the outbuilding known as and utilized as the 'dance hall,' and has seen Roosevelt Harris go to the other outbuilding, located about 50 yards from the residence, on numerous occasions, to obtain whiskey for this person and other persons."¹⁰³ Although there is no indication that the informer had given reliable information in the past, the tip was supported by the affiant's recitation of the facts in the warrant as follows: (1) the defendant had a reputation as a bootlegger; (2) "all types of persons" had supplied information as to the defendant's "activities"; and (3) another police officer had made a seizure of illicit whiskey from an "abandoned house under Harris' control" within the past four years.¹⁰⁴ The affiant also indicated that he had "interviewed this person [the informant, and], found this person to be a prudent person."¹⁰⁵ In a 5-4 decision written by Chief Justice Burger, the Court implied that the information in the tip was sufficiently corroborated for the magistrate to conclude that the information furnished was "reliable." In view of the detailed tip and the fact that the information was based on the "personal and recent observations"¹⁰⁶ he concluded "that the affidavit in the present case contains an ample factual basis for believing the informant which, when coupled with affiant's own knowledge of the respondent's background, afforded a basis upon which the magistrate could reasonably issue the warrant."¹⁰⁷ The information within the affiant's "own knowledge" deemed corroborative of the tip was the policeman's knowledge of the accused's reputation, plus the seizure of illicit whiskey from the accused within the last four years by Constable Johnson. This reasoning is supported by the second

¹⁰² *Id.* at 575.

¹⁰³ *Id.* at 575-76.

¹⁰⁴ *Id.* at 575.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 579.

¹⁰⁷ *Id.* at 579-80. The opinion of the Court was divided in three parts. The entire opinion was joined by Justices Black and Blackmun who favored overruling *Spinelli* or *Aguilar*. Justice White agreed with the portion of the opinion dealing with the weight to be attached to declarations against interest and "concluded that the affidavit, considered as a whole, was sufficient to support issuance of the warrant." *Id.* at 585. Justice Stewart agreed with the aforementioned part of the opinion dealing with the corroboration of the tip. *Id.* Justice Harlan wrote a lengthy dissent; he was joined by Justices Brennan, Douglas, and Marshall. *Id.* at 586.

INFORMANTS

portion of the opinion.¹⁰⁸ In that portion of the opinion, Chief Justice Burger stated that the statement in *Spinelli* that the evidence of the defendant's reputation was "bald and unilluminating" was based on a misreading of *Nathanson v. United States*.¹⁰⁹ He stated that the *Nathanson* decision was limited to the holding that "reputation, standing alone, was insufficient; it surely did not hold it irrelevant when supported by other information."¹¹⁰ Reputation evidence certainly must be considered since it is a factual and practical consideration of everyday life upon which reasonable and prudent men act.¹¹¹ In support of this proposition, the Chief Justice looked to the *Jones*¹¹² and *Brinegar* cases.¹¹³ In neither of these cases, however, was reputation evidence a decisive factor. The warrant affidavit in *Jones* showed both general reliability and particular knowledge, and *Brinegar* was replete with corroborative details uncovered by police surveillance.

In examining these cases, the question arises as to whether *Draper*, *McFarland*, and *Harris* can be distinguished from *Weshenfelder* and *Spinelli*. In reconciling these cases, one might discover what criterion was used by the courts to determine whether there was adequate corroboration.

One possible criterion is the number of facts corroborated. In *Draper* and *Miller* four facts were verified and a tip was held sufficient to establish probable cause.¹¹⁴ If this is the criterion, how can we explain *Weshenfelder*? Four facts were again corroborated.¹¹⁵ How can *Harris* be reconciled where the corroboration of one fact was held sufficient?¹¹⁶ Of course, the response might be that these cases seem to turn on the control the informant had over the facts corroborated. In *Weshenfelder*, one of the neutral facts corroborated was that the informer was located in the bar where he said he would meet the CID agents.¹¹⁷ The verification of this fact does not indicate the information contained in the tip was obtained in a "reliable manner" since it was solely dependent on the informant.¹¹⁸

¹⁰⁸ Justices Black and Blackmun concurred in this portion of the opinion. *Id.* at 585.

¹⁰⁹ 290 U.S. 41 (1931).

¹¹⁰ *Harris v. United States*, 403 U.S. 573, 582 (1971) (emphasis supplied).

¹¹¹ *Id.* at 583-84.

¹¹² *Jones v. United States*, 362 U.S. 257 (1960).

¹¹³ *Brinegar v. United States*, 338 U.S. 160 (1949).

¹¹⁴ See notes 17, 90-93, *supra*, and accompanying text.

¹¹⁵ See notes 94-96, *supra*, and accompanying text.

¹¹⁶ See notes 101-11, *supra*, and accompanying text.

¹¹⁷ See note 96, *supra*, and accompanying text.

¹¹⁸ *United States v. Harris*, 403 U.S. 573, 580 (1971).

60 MILITARY LAW REVIEW

Another closely related criterion is the nature of the facts contained in the tip. Here again facts not presenting an unusual factual setting may be clearly predictable or easily ascertainable. Corroboration of such information will not be indicative of reliability. Certainly telling the police where a particular bar is located and their verification of that fact would not be indicative of reliability as to whether the accused committed a particular crime.¹¹⁹ However, where the tip by the informant relates "personal and recent observation . . . of criminal activity" as in *Harris* rather than a "small detail"¹²⁰ indicating "nothing unusual" in the relation to day-to-day activities¹²¹ and such fact is corroborated, this may at least satisfy one prong of the *Aguilar* test. From a practical view point, the police should attempt to verify the information contained in every tip.

Another factor distinguishing *Draper* and *Miller* from *Weshenfelder* and *Spinelli* is the proven reliability of the informant. Where the reliability of the informer has been established plus there is a verification of non-criminal facts, the *Aguilar* test is passed.¹²² Or, to state the proposition differently, where one prong of the *Aguilar* test is independently satisfied, the number of facts corroborated may take on less importance.¹²³ Certainly where there is corroboration of some items relating to criminal activities as compared to mere neutral facts, the test will be passed.¹²⁴ However, should the test be passed where there is corroboration of behavioral patterns not related to criminal behavior? This question can be answered by examining a not too unrealistic hypothetical case. The informant tells the CID agent that every Fri-

¹¹⁹ See *United States v. Weshenfelder*, 20 U.S.C.M.A. 416, 43 C.M.R. 256 (1971).

¹²⁰ *Spinelli v. United States*, 399 U.S. 410, 417 (1969).

¹²¹ *Id.* at 414.

¹²² See *United States v. Draper*, 358 U.S. 307 (1959); *United States v. Miller*, 21 U.S.C.M.A. 92, 44 C.M.R. 146 (1971); *United States v. McFarland*, 19 U.S.C.M.A., 41 C.M.R. 356 (1970).

¹²³ See, e.g., *United States v. Manning*, 448 F.2d 992 (2d Cir. 1971) (Personal observation corroboration of noncriminal behavior sufficient to pass *Aguilar* test.)

¹²⁴ *United States v. Wheeler*, 21 U.S.C.M.A. 468, 45 C.M.R. 242 (1972). Informant told the CID agent that he and the accused took a stereo and a television set from two named victims. Moreover, the informant told the agent where both of these items were taken and sold by the accused. The Court held that the knowledge gained by the agent from the informant "more than adequately provide probable cause for the apprehension" of the accused since the stolen property was recovered from the location identified by the informant, the individual who purchased the stereo partially described the accused, and the purchaser of the television made a photographic identification of the accused. *Id.* at 472-73, 45 C.M.R. at 246-47

INFORMANTS

day afternoon the accused drives a 1966 blue, two-door Chevelle to his girlfriend's, Miss Jane Smith's, house located at 102 Sycamore Avenue, Kileen Texas, just outside Fort Hood, Texas. He also states that the accused carries a brown paper shopping bag into the house which he uses as a base for the sale of narcotics. The law enforcement officer who obtained the above information indicates in his affidavit that on the past two Friday afternoons he saw the accused drive up to 102 Sycamore Street in a 1966 blue Chevelle carrying a brown bag into the house. He also verifies the fact that Jane Smith lives at that address. The information furnished in this affidavit does not pass either the basis of knowledge or the reliability test of *Aguilar* unless there has been sufficient corroboration.¹²⁵ Since we are dealing with probable cause, the question is whether there is a probability,¹²⁶ not that such activity is more probable than not, that the accused is using his girlfriend's house as a base of operations.¹²⁷ In this case, the police officer has verified six of seven facts, that is that on (1) Friday afternoon (2) the accused drives to (3) Miss Jane Smith's residence (4) located at 102 Sycamore Avenue, Kileen, Texas, (5) in a 1966 two-door Chevelle. (6) He then carries a brown bag into Miss Smith's home which he uses as a (7) base of operations for selling narcotics. Had there been an independent verification by the police of all seven facts, there would have been a *prima facie* showing that the accused was selling narcotics. However, proof of guilt is not the question.¹²⁸ Even though all the facts but the one relating to the criminal activity have been verified, the tip has not been made more "believable by the verification."¹²⁹ The information given to the battalion commander would easily be obtained as a result of "day-to-day conversation"¹³⁰ or observation thus not lending reliability to the information. The same would be true of the tip in *Miller* unlike *Draper* where the information would not be the result of a day-to-day conversation.

¹²⁵ Cf. *Draper v. United States*, 358 U.S. 307 (1959); *United States v. Miller*, 21 U.S.C.M.A. 92, 44 C.M.R. 44 (1971); *United States v. Harris*, 403 U.S. 573 (1971), and notes 80-131, *supra*, and accompanying texts.

¹²⁶ *Spinelli v. United States*, 393 U.S. 410, 418 (1969). Whether "suspicions engendered by the . . . (tip have) ripen(ed) into a judgment that a crime was probably being committed." See also *United States v. Lidle*, 21 U.S.C.M.A. 455, 45 C.M.R. 229 (1972); *United States v. Alston*, 20 U.S.C.M.A. 581, 44 C.M.R. 11 (1971).

¹²⁷ See Model Code of Prearraignment Procedure, Section 3.01. (Tentative Draft No. 1).

¹²⁸ *Spinelli v. United States*, 393 U.S. 410, 419 (1969).

¹²⁹ *Id.* at 427.

¹³⁰ *Id.*

V. CONCLUSION

Where hearsay is used to establish probable cause, there are numerous methods to meet the basis of knowledge and reliability test of *Aguilar*.¹³¹ The courts have indicated that both tests will be satisfied when the information contained in the tip is corroborated. What constitutes adequate corroboration is not clear. The courts will probably use the criterion of the number of facts corroborated provided the facts are not easily ascertainable¹³² and three or four of the facts have been verified. There would be greater protection of fourth amendment rights if the police were required to corroborate facts indicative of criminal activity where the informer is not a trained police undercover agent or reputable member of the community. As a practical matter, police officials should attempt to corroborate every tip from any person who is not a police official. But this investigation need not be sufficient in and of itself to establish probable cause. Where an informant knows his tip will be tested, he would be less likely to fabricate stories. Hopefully, this would improve the quality of the informant's tip.

Where the past reliability of the informant has been established, the basis of knowledge test may be satisfied by showing the informant obtained his information as a result of a statement of the accused or by direct observation of criminal activity. Alternatively, an inference that his information was gained in one of those manners may be drawn when the information is so detailed as to be self-verifying. This information, as with corro-

¹³¹ Alternative methods of satisfying the *Aguilar* two pronged test:

A. Basis of knowledge test:

1. Statement by affiant that the informant obtained his information by direct observation or that his information was the result of overhearing a statement of the accused or his accomplice. *See note 18 and accompanying text.*
2. Self-verifying detail. *See notes 21-25 and accompanying text.*
3. Corroboration. *See notes 80-131 and accompanying text.*

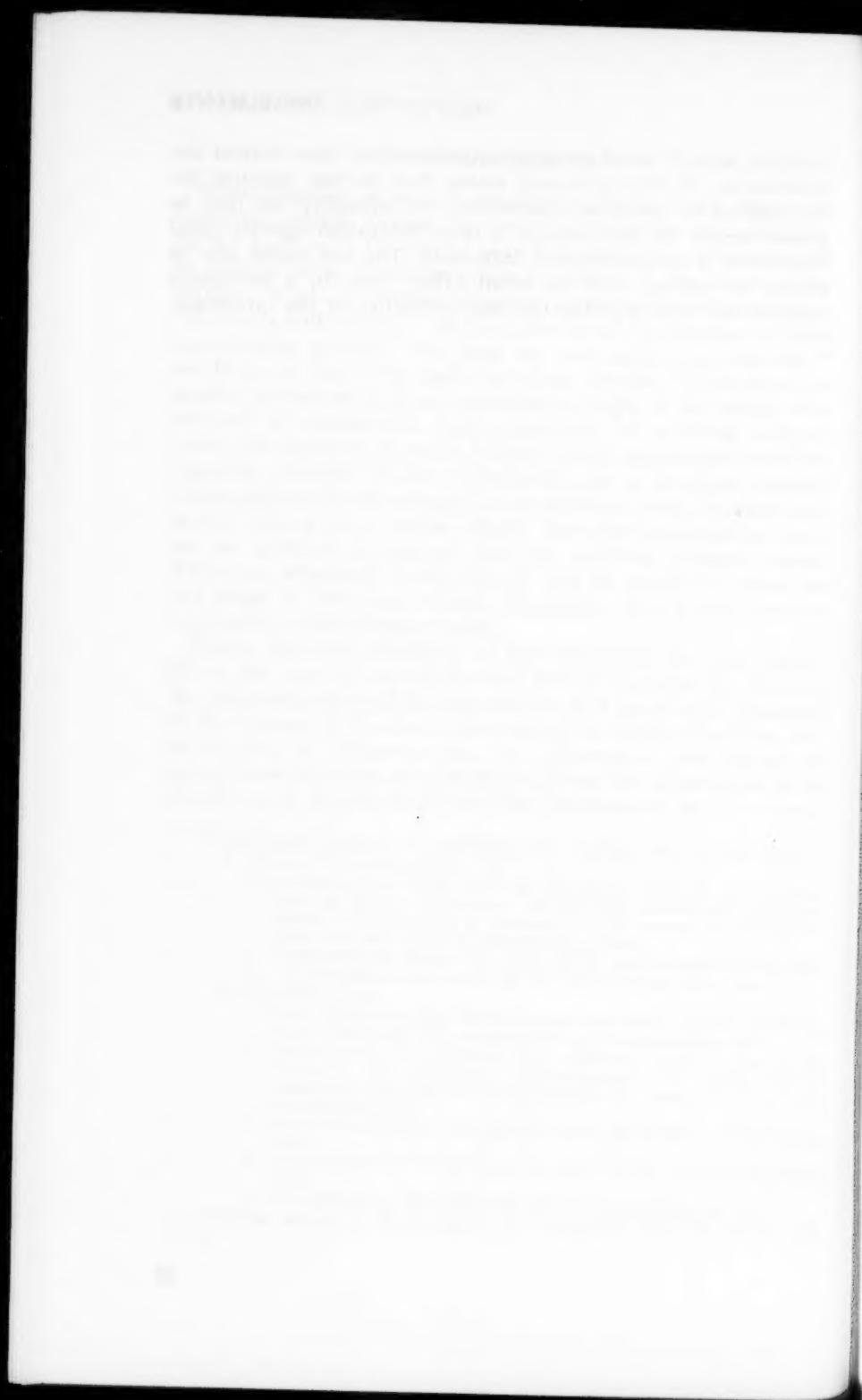
B. Reliability test:

1. Bald statement that the informant has given truthful information in the past. *See notes 29-34 and accompanying text.*
2. Statement as to reliability plus additional facts setting forth "some of the underlying circumstances" from which affiant concluded the informant was reliable. *See notes 35-47 and accompanying text.*
3. Declaration against interest. *See notes 49-58 and accompanying text.*
4. Presumption of reliability. *See notes 59-78 and accompanying text.*
5. Corroboration. *See notes 80-131 and accompanying text.*

¹³² *United States v. Weshenfelder*, 20 U.S.C.M.A. 416, 43 C.M.R. 256 (1971).

INFORMANTS

boration, should detail criminal activity rather than neutral circumstances. If the informant states that he has obtained his information by personal observation, the reliability test may be passed where the tip contains a true declaration against penal interest by a nonprofessional informant. The test might also be passed by setting forth in detail rather than in a conclusory manner the facts showing the past reliability of the informant.



PLAIN VIEW SEARCHING*

By Captain John Rintamaki**

I. INTRODUCTION

Rules for the collection of criminal evidence have been evolved for a variety of reasons, some rules are directed towards assuring high quality evidence at the trial proceeding itself, thus hopefully securing a higher quality trial. Other rules, however, are designed to control the conduct of the evidence gathering process so that other interests of society will be protected. One such interest of society is privacy. The 4th Amendment to the US Constitution proscribes any "unreasonable searches" and through court decision, the meaning of "unreasonable" has been carved out. In general, only incursions absolutely necessary to a criminal prosecution are allowed. To this end, the 4th Amendment requirement of probable cause for the issuance of a warrant by an impartial magistrate has been strictly construed. Evidence, however, is sometimes gathered in a manner outside the ambit of the search warrant mode, and, in some circumstances, is as admissible as if all technical requirements of the traditional evidence gathering process were met. It is one of these techniques of discovery, the plain view search, which will be discussed in this article.

A plain view search may be the accidental discovery of evidence by a person who innocently and with no forewarning comes across it. Examples are many: a person finding abandoned drugs on the street; a person looking for an address of a house, seeing stolen goods in the next yard; a policeman upon invitation, entering a house and seeing marihuana; or a commander, walking through the barracks, seeing a stolen item. In such situations

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60 MILITARY LAW REVIEW

the word search is somewhat inappropriate. Search implies a planned examination of an area for a specific item whereas the plain view "search" depends on chance observation. Privacy, in the sense of a sanctuary-like sphere surrounding an individual, is not offended by the plain view search concept because not only does the concept rely on chance observation: it also relies on items being readily and openly observable—that is, not truly private. Certain specific parameters will be discussed in the first section of the article to provide the reader with the present limits of the plain view doctrine. These parameters involve the following considerations:

1. The physical place from which the view can be made.
2. The nature of sensory organ which makes the perception.
3. The types of devices which may be used to assist perception.
4. The required degree of recognition of the item as having evidential value.
5. The degree of inadvertence required.
6. The rationale behind the constitutionally-acceptable seizure.

The subject of military inspections will also be studied, as it appears that this means of producing criminal evidence is without any acceptable logical foundation except plain view. Other theories often used to support the military inspection will be discussed and criticised.

In a recent United States Supreme Court Case, *Coolidge v. New Hampshire*,¹ a conviction based on evidence produced by a search warrant was reversed when the search warrant was deemed by the court as not meeting constitutional requirements.² The Court gratuitously examined theories which might have made the evidence nonetheless admissible, but concluded that none of the many theories would be successful in Coolidge's case.

¹ 403 U.S. 443 (1971).

² In the conduct of a murder investigation, the police took the accused into custody for interrogation and at the same time visited the petitioner's wife at home regarding the murder weapon. At the time of these actions, the police knew that an automobile was involved. Three weeks later, the police arrested petitioner at his house and applied for a search warrant for the car at the same time. The warrant was issued by an attorney general who was directing the investigation and, later, the prosecution. The Supreme Court condemned the search warrant because it was issued by a member of the law enforcement agency, not a "neutral and detached magistrate [as] required by the Constitution." 403 U.S. at 453.

This case may change the basic search authority employed in the military. In military practice, the commander having jurisdiction of a physical area may authorize the search. Paragraph 152, *MANUAL FOR COURTS-MARTIAL, 1969, REVISED* [hereinafter cited as MCM, 1969]. Often, he is also the commander of the person suspected, and generally is not an impartial agent.

PLAIN VIEW

In so doing, however, the plain view search doctrine was uncovered and substantially delineated by the Court.

This article will analyze cases including applicable military cases on all aspects of the plain view doctrine to provide specific guidelines for the practitioner. Thus, a case-by-case analysis will often be helpful. Federal civilian and court-martial cases,³ for the purposes of this article will be treated as one because no significant difference between the case law of plain view in the two jurisdictions can be found.⁴

II. THE PLAIN VIEW SEARCH

The seizure of evidence ordinarily arises in the following circumstances: The police, or some other enforcement agency, find themselves, by design or chance, in a spot from which they observe criminal evidence. They are aware of the recent crimes in the area and the contraband taken. In addition, because of their training and experience, they can recognize other items of contraband or evidence (such as marihuana, sawed-off shotguns, and the like) when they see them. Questions cross their minds: May they seize it? Do they need a search warrant? May they arrest a person connected with the seen item? These questions are not easy to answer. The penalty for the wrong answer, assuming that the evidence is seized, is that the evidence is inadmissible. A study of the cases is in order to determine the circumstances in which seizure by the police is permissible.

A. PLACE FROM WHICH THE VIEW MAY BE MADE

The view on which the seizure is based, must be innocent. A survey of the cases reveals that the place from which the view is made often controls the admissibility of the item seized.

1. *Public Land.* If the viewer is on public land such as streets, highways, or sidewalks, the view leads to a lawful seizure.⁵ If

³ Moreover, while courts-martial exist by virtue of Article I of the United States Constitution and federal courts, by Article III, there is a scheme of mutuality in several areas, including evidence matters.

The basic military rule for testing the validity of searches and seizures is set forth in paragraph 152, MCM, 1969: "Evidence is inadmissible against the accused: If it was obtained as a result of an unlawful search. . . ." While several examples of lawful searches are set forth, one must look to paragraph 137, MCM, 1969, for the complete answer. "So far as not otherwise prescribed in this manual, the rules of evidence generally recognized in the trial of criminal cases in the United States district courts . . . will be applied by courts-martial."

⁴ See J. MUNSTER AND M. LARKIN, *MILITARY EVIDENCE*, 415-17 (1959).

⁵ *Trujillo v. United States*, 294 F.2d 583 (10th Cir. 1961).

60 MILITARY LAW REVIEW

the evidence itself is on the public land, it is seizable whether or not a prior view occurred.⁶ Evidence located in a private place may lawfully be seized on the probable cause supplied by the observation.

2. *Quasi-public land.* In this category rest lands ordinarily open to the public such as lobbies of hotels, stores, and other commercial areas, and areas ordinarily private, but held open for the public, such as common passageways or corridors of hotels or apartment buildings. May police or other viewers lawfully enter to view without anyone's consent? The courts have held they may. Thus, revenue agents were able to enter upon a common auto driveway to view a chicken coop full of illegal alcohol,⁷ and federal agents could use the common passageway of several apartments to view the disposal of narcotics.⁸ In addition, the police or others, when in a commercial shop such as a restaurant or valet shop, may look through open doors. If they see contraband, such as illegal lottery material, they may seize it.⁹ In brief, a view made from a place where anyone may lawfully enter is not constitutionally objectionable.

3. *Private places.* Ordinarily, before one may enter a private place to search and seize, a valid search warrant must exist. However, the courts have held that under a variety of circumstances, police may validly be in a private place without a warrant. Once lawfully in an area, they may seize evidence they see, What, then, are the "acceptable" reasons for entry?

The first and most obvious is the invitation to enter. In *Davis v. United States*,¹⁰ the police who suspected Davis of drug transactions, went to his house to talk with him. They had no plan to arrest or to search Davis. Upon identifying themselves at the door, the police were invited in by Davis' 8 year old daughter. As soon as the police entered, they saw a wastebasket on the floor full of marihuana. They seized the marihuana and arrested Davis for possession of marihuana. The court held that police may ask to talk to a man at his house at reasonable times and if invited in, do not have to close their eyes. In *United States v. Conlon*,¹¹ the question of who can give consent was considered. The observation was ultimately made in a garage rented by

⁶ *Id.*

⁷ *Safarik v. United States*, 62 F.2d 892 (8th Cir. 1933).

⁸ *Polk v. United States*, 314 F.2d 837 (9th Cir. 1963).

⁹ *Fisher v. United States*, 205 F.2d 702 (DC Cir. 1953).

¹⁰ 327 F.2d 301 (9th Cir. 1964).

¹¹ 14 U.S.C.M.A. 84, 33 C.M.R. 296 (1963).

PLAIN VIEW

Conlon. A lady rented a house next to the garage and both she and the rental agent from whom she rented the parcel thought it included the garage. When she was entering the garage after sawing the lock off, a burglar alarm went off. She called the local police to assist in shutting the alarm off. They saw stolen property, called the OSI, and a conviction was obtained and upheld even though the lady was not empowered to give consent to anyone.

While in *Conlon* the Court of Military Appeals approved of the wrong person giving consent, *United States v. Garlich*¹² presents a narrow view of rightful consent wrongly given, and probably overrules *Conlon*. In *Garlich*, the accused bought a non-operating auto from Mrs. A. The car was in the physical possession of a mechanic who was to repair the car. Several friends of the accused became suspicious of the accused's conduct, and went outside to look into the car on the mechanic's property. They saw miscellaneous property through the window but couldn't recognize any of it as stolen. They returned to their ship and told the Officer of the Day who appointed the Master at Arms to investigate. The Master of Arms got permission to enter the car from Mrs. A. and from the mechanic who was going to work on the car. He entered and seized the miscellaneous property which turned out to be stolen. Garlich was later convicted of larceny. The conviction was set aside as the Court held that the Master at Arms was a trespasser. It suggested that Mrs. A. could have lawfully entered the car to secure additional documents necessary to complete the sale, and that the mechanic could lawfully have entered the car for repair, but neither could lawfully have been in the car for any other purpose. Thus, they could not authorize anyone else to do what they could not do, and the Master at Arms was a trespasser. The Court opined that if either Mrs. A. or the mechanic, and, I presume, an agent of either, were in the car for one of the restricted but legitimate purposes, and in the course of that business saw contraband, then that contraband would have been properly seizable and admissible.

If the police walk up to a house using the regular sidewalk, they may seize evidence on the ground next to the sidewalk and use that evidence at the trial and as grounds for the arrest. In *United States v. Ellison*,¹³ the police were aware of a drugstore robbery in which narcotics and cigarettes were taken. Since the *modus operandi* used in the robbery matched that used by

¹² 15 U.S.C.M.A. 362, 35 C.M.R. 334 (1965).

¹³ 206 F.2d 476 (DC Cir. 1953).

60 MILITARY LAW REVIEW

Ellison at some prior time, the police decided to talk to Ellison. At the time of the visit to Ellison, the police did not intend to arrest him, or search or seize. They were simply following possible leads. While waiting on the porch of Ellison's house, they saw several medicine bottles of the kinds used in the drugstore robbed and some cigarettes. They seized the items seen, and arrested Ellison. The court indicated the basic theory:

If an officer sees the fruits of crime—or what he had good reason to believe to be the fruits of crime—lying freely exposed on a suspect's property, he is not required to look the other way, or disregard the evidence his senses bring him.¹⁴

In *Davis* and *Ellison* the police were visiting the accused during normal daytime hours for the purpose of investigating a crime. The inquiry had not narrowed down to those individuals as prime suspects. In both cases, the courts held that the police were properly on the private property, and hence, the products of their inadvertent views were admissible.

The entry onto private property may also occur when the invitation comes from a cooccupant of the premises. In *United States v. Sumner*,¹⁵ an assistant secretary of an NCO club went into the office normally occupied by himself and the accused, late at night. He discovered the accused and another man, sleeping next to one another, nude. The NCO then left and invited the police to enter the office. They did and observed an act of sodomy being committed. Once lawfully on the premises, the police could observe that which was occurring in plain sight.

It is not necessary that the entry for investigatory purposes be for investigating the accused, so long as the persons being investigated are reasonably related to the scope of the investigation. In *United States v. McDaniel*,¹⁶ the police went back to a room occupied by the accused to talk to two women there who were potential witnesses. When the police were invited into the room, they saw a torn towel. They knew that a towel had been involved in the crime, and therefore seized it. The seizure was good and the towel admissible, as the police didn't expect to find the towel when interviewing the women, did not go to the room to seize it, and were not trespassers.

In other circumstances, police, properly present in a house or a car pursuant to a valid warrant, who inadvertently observe an-

¹⁴ *Id.* at 478.

¹⁵ 34 C.M.R. 850 (AFBR 1963).

¹⁶ 154 F.Supp. 1 (DDC. 1957).

PLAIN VIEW

other item of evidence, may seize it.¹⁷ In *United States v. Doyle*¹⁸ for instance, the police had a valid authorization to search a car for stolen seat covers. While looking at the seat covers, the police glanced at the sun visor and saw an unauthorized Master at Arms badge. It was seized and admissible at trial. Although the case was early (1952) it is still good law. The Court of Military Appeals said that items relatively apparent in the conduct of a search are admissible. Moreover, dicta in *Coolidge v. New Hampshire* suggests this rationale is still good and applicable to unrelated items seen in the course of a search with a warrant or a search incident to arrest.¹⁹

If the police are entering a house to arrest a person, and have acceptable grounds to enter, they may keep their eyes open. In *Ker v. California*²⁰ the police entered to arrest Mr. Ker. Upon entry, they noticed Mrs. Ker in the kitchen with a bag of marihuana on the scale. They seized that marihuana and arrested Mrs. Ker along with her husband. The police did not suspect Mrs. Ker nor did they expect to find marihuana at the house, according to evidence of record. It was held, that the seizure was good, the presence of the police in the apartment lawful, and Mrs. Ker's conviction of possession of marihuana good.

What about entry on private property made by an undercover agent? In *Lewis v. United States*,²¹ the undercover agent was buying marihuana. The accused invited him to his home twice and sold him marihuana there. Although the court characterized Lewis' home as a business center, thereby hinting that this house may not be a private place but rather quasi-public, the control-

¹⁷ This new item is unrelated to the warrant. This paper will not deal with the interpretation of poorly drawn warrants or a discussion of seizure of items which should have been included in the warrant but weren't. For a military case on this point, see *United States v. Vierra*, 14 U.S.C.M.A. 48, 33 C.M.R. 260 (1963). See also *Stanford v. Texas*, 379 U.S. 476 (1965); *United States v. Rabinowitz*, 339 U.S. 56 (1950); *United States v. Lefkowitz*, 285 U.S. 452 (1932); *Marron v. United States*, 275 U.S. 192 (1927); and *Steele v. United States* 267 U.S. 498 (1925) *rehear. den.* 267 U.S. 505.

¹⁸ 4 C.M.R. 137 (1952).

¹⁹ See, Mr. Justice Stewart's majority opinion in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), analyzing *Chimel v. California*, 395 U.S. 752 (1969), indicating that in *Chimel*, at 763, "[w]here, however, the arresting officer inadvertently comes within plain view of a piece of evidence, not concealed, although outside the area under the immediate control of the arrestee, the officer may seize it, so long as the plain view was obtained in the course of an appropriately limited search of the arrestee." This would extend to plain views made during a stop and frisk situation permitted by *Terry v. Ohio*, 392 U.S. 1 (1968). *Sibron v. New York*, 392 U.S. 40 (1968), so long as the stop and frisk were first good.

²⁰ *Ker v. California*, 374 U.S. 23 (1963).

²¹ 385 U.S. 206 (1966).

60 MILITARY LAW REVIEW

ling theory espoused is that the invitation to enter made the subsequent entry lawful. What was seen from that vantage point was seizable.

Police are sometimes called upon to respond to emergencies. In *United States v. Barone*²² police officers on the street heard screams from a rooming house. They went to the room in question and were let in by the two lady occupants. The ladies denied hearing or emitting screams. The police hearing the toilet flush, and seeing a man in shorts emerge from the bathroom, entered the bathroom. They saw pieces of counterfeit currency floating in the toilet. The seizure of the currency was upheld as the court announced the police were properly responding to the emergency situation and could briefly look around the bathroom, including a glance into the toilet bowl.

In all the foregoing cases, the courts relied on the conclusion that the police were properly on the spot from which they made the view. The converse of the proposition is also true. If the police are trespassers, that which they see is not properly seizable. In *Hobson v. United States*²³ the police were going to arrest a known heroin seller. They had known about Hobson for about one month prior to the arrest. One policeman went to the front door and knocked while another went into the enclosed back-yard (a trespass) to catch anything thrown out the back window. Heroin thrown out the back window was seized. The heroin was inadmissible because the policeman-receiver was a trespasser. The court chastised the police force which waited one month before conducting the warrantless transaction.

The trespass needn't be blatant. In *United States v. Lumia*²⁴ the federal revenue agents saw the accused placing tin cans of the kind used to transport illegal alcohol in a locked cupboard in a common hallway of an apartment. The agents seized the cans but the seizure was bad as there was a trespass not in the hallway but into the locked cupboard. Presumably the agents could have testified about what they had seen from their lawfully occupied spot under the theory of the *Polk* case, but such testimony, absent the alcohol, wouldn't support a conviction.

The "open field doctrine" announced in *Hester v. United States*²⁵ presents a brief study of the degree of intrusion. Revenue agents went to the accused's father's land and saw the accused drop a bottle containing illegal alcohol. The view was made from

²² 330 F.2d 543 (2d Cir. 1964).

²³ 226 F.2d 890 (8th Cir. 1955).

²⁴ 36 F.Supp. 552 (W.D.N.Y. 1941).

²⁵ 265 U.S. 57 (1924).

PLAIN VIEW

an "open field" owned by the father. This field surrounded the house in which both the father and son lived. The court seemed to announce that the technical classification of "trespasser" isn't enough to preclude the police from making admissible views. Instead, the sphere of privacy was interpreted in *Hester* to be of less inclusion, perhaps limited to the house itself.

Moreover, if the police are trespassers on property other than the accused's, the courts have held that their views from such positions are good and support a seizure.²⁶ This open field doctrine has been explicitly adopted by the military.²⁷ Thus, if the police or other observing agent is not a trespasser as to the accused, either because the land is public or quasi-public, or because the land is private but the entry is permissible, a view of an item of evidence from that locus, and seizure thereafter, provides admissible evidence.

4. *Conclusion.* In all of the foregoing cases, the observers were lawfully present, insofar as the accused's standing to object, in the place from which they made the view. In analyzing any plain view situation, the lawfulness of the presence of the observer must first be ascertained. If the observer is a trespasser as to the accused, the evidence seen from that spot will be inadmissible.

B. THE MODE OF OBSERVATION

Once the police or other observers are in a position to make a view, a question often arises about the actual observation and whether or not it may be aided by artificial means.

1. *Sight.*

(a) *Conventional Illumination.* Automobiles with operative dome lights have provided a class of cases. A typical example is *Busby v. United States*,²⁸ wherein Busby was stopped because the rear license plate light of his car was out. After some discussion, Busby got out of the car to produce his driver's license. When he opened the door, the dome light went on, illuminating a sawed-off shotgun. Seizure occurred, followed by arrest and conviction of a firearms violation. The court paid no attention to the role of artificial light, simply relegating the case to the plain view collection.

In *Petteway v. United States*,²⁹ a federal agent stopped a suspected alcohol runner. He then concluded that he had stopped

²⁶ *McDowell v. United States*, 383 F.2d 599 (8th Cir. 1967).

²⁷ Paragraph 152, MCM, 1969: ". . . The following searches are among those which are lawful: . . . A search of open fields or woodlands, with or without the consent of the owner or tenant. . . ."

²⁸ 296 F.2d 328 (9th Cir. 1961).

²⁹ 261 F.2d 53 (4th Cir. 1958).

60 MILITARY LAW REVIEW

the wrong man. However, the driver said he had 7 cases of illegal alcohol. The court affirmed the conviction on the consent theory, but said in dicta that when the agent approached the car (at night), shining his flashlight into the car, and seeing in the light beam 2 cases of alcohol, he could seize the alcohol under the plain view exception. *Petteway* agrees with an earlier case from the same circuit on essentially the same facts. In *Smith v. United States*³⁰ a sheriff, with a warrant to search several buildings, drove up to one of the buildings and saw a car with its rear door open. He shined his flashlight in and saw 216 bottles of illegal alcohol. The court said the seizure was good as it ". . . is not a search to observe that which is open and patent, in either sunlight or artificial light."³¹

This proposition was again repeated in a seizure of gasoline ration coupons by agents who were waiting for the suspect to approach. The agent flashed the light into the suspected car when it came to the station and saw the books on the front seat. The seizure was good under the artificial light even though it was planned in advance.³²

A searchlight may also be used. In *United States v. Lee*³³ a Coast Guard cutter was on patrol late at night and flashed its searchlight onto the accused's boat. The light fell on cases of illegal alcohol. The seizure which followed was upheld by the U.S. Supreme Court. The observation and arrest occurred some 24 miles off the U.S. coast, in an area then known as Rum Row. This case differs from *Lumia* because of the special authority in the Coast Guard to arrest, search, seize, and impound American vessels on the high seas when there is probable cause to believe that a U.S. revenue law is being violated.³⁴ Thus, after the good view of the illegal alcohol occurred, the boatswain of the Coast Guard vessel, having probable cause to believe that a violation of the prohibition laws, could lawfully arrest and seize.³⁵

(b) *Ultraviolet Light*. One military case gave an Army Board of Review a chance to discuss ultraviolet light in the plain view application, but the opportunity was sidestepped.³⁶ In that case, the CID, investigating break-ins of vending machines, painted the machines with fluorescent paste which would show under

³⁰ 2 F.2d 715 (4th Cir. 1924).

³¹ *Id.* at 716.

³² *United States v. Strickland*, 62 F.Supp. 468 (W.D.S.C. 1945).

³³ 274 U.S. 559 (1927).

³⁴ See 42 Stat. 858, 981, 982 and *The Underwriter*, 13 F.2d 433 (2nd Cir. 1926).

³⁵ *United States v. Lee*, 274 U.S. 559, 562 (1927).

³⁶ *United States v. Morse*, 9 U.S.C.M.A. 799, 27 C.M.R. 67 (1958).

PLAIN VIEW

ultraviolet light. When the treated machines were broken into, all of the men in the area were gathered and examined. The accused was singled out because fluorescent paste was observed on his hands with the *naked eye*. The ultraviolet light only provided confirmation of the paste when shined on his hands and on portions of his clothing. The court said that a visual inspection was not a search and was therefore good. It did not distinguish between those stains observable with the naked eye and those observable only under ultraviolet light.

2. Smell.

Narcotics agents and literary bards often suggest that opium, heroin, marihuana, and other drugs give off a peculiar and unique odor. In *Johnson v. United States*³⁷ several narcotics agents, acting on a tip concerning opium use, went to a hallway of a hotel and smelled opium burning. They followed the scent to the emitting room and entered. While both the search and arrest were defective for failure to secure a warrant, the Supreme Court did say that the smell of opium, if properly identified by experienced agents, would furnish good evidence for the issuance of a warrant. The Court held that the evidence available to the agents while outside Room 1 would be sufficient for a warrant and opined that there was no good reason for the absence of a search warrant. Instead, the police had entered the room and arrested Johnson so they could search. The government conceded in its brief that the police had no probable cause to arrest until after they had entered the room and discovered only one occupant. Thus, since the Court concluded a search warrant was necessary to lawfully enter the room, the entry without the warrant was unlawful, and the evidence gained by that unlawful entry would not support a lawful arrest and any searches incident thereto. Hence, although only dicta, the decision clearly suggests that plain view may include plain smell.

The 5th Circuit agreed in *Walker v. United States*.³⁸ A federal agent experienced in the smells of the illegal alcohol industry, located, with the assistance of a tip, an illegal alcohol plant in production.³⁹ A seizure and series of arrests followed. They were defective for reasons to be later discussed concerning exigency,

³⁷ 333 U.S. 10 (1948).

³⁸ 225 F.2d 447 (5th Cir. 1955).

³⁹ Even the court paid some attention to the peculiar odor of "cooking still mash" as opposed to the smells emitted by other phases of the operation. Apparently it has a "mellow, more sour odor than a bakery would put out with yeast . . ." Agent Boone testifying at 225 F.2d 451 (J. Rives dissent).

60 MILITARY LAW REVIEW

but the court concluded that the plain smell evidence was appropriate for the issuance of a search warrant.

3. *Hearing.*

Sound detection and recording devices have generated many cases about Fourth Amendment infringement by spike mikes and other devices. In the plain view area, two cases are particularly significant.

(a) *Electronic Recording.* One case, *Lopez v. United States*,⁴⁰ permits the use of a "bugged" agent. The agent is inserted somewhere in the criminal transaction. He carries a small recorder or a microphone connected to or transmitting to a recorder elsewhere.⁴¹ He overhears conversations and later may testify about them. The key issue is not electronic device but rather whether the agent who hears the conversation may testify about what he heard. If he can hear conversations which are ordinarily "overhearable," then he may testify about them and use electronically recorded material for corroboration. One might call this the "plain hear" doctrine, but it belongs in the genus plain view. The U.S. Supreme Court has accepted the "bugged agent" device originally sanctioned in *On Lee v. United States*.⁴²

The theory announced in *Lopez* that there was no eavesdropping because there was no listening in on a conversation which couldn't ordinarily be heard⁴³ paved the way for the second and perhaps most significant case concerning electronic surveillance.

(b) *Electronic Amplification.* In *Katz v. United States*⁴⁴ federal agents were investigating wagering violations. Public phone booths were used for wagering communications. The agents hooked up a recording and listening device to a suspect booth and later arrested the accused on the basis of information secured through this surveillance. The conviction was overturned on the basis of that surveillance. The Court held that the statements couldn't be overheard by passers-by but could only be detected by turning the telephone booth into a microphone. Justice Harlan commented on a theory of expectation in a concurring opinion. Although more will be said about the theory later, its basis is the reasonableness of the suspect's expectation that what he is

⁴⁰ 373 U.S. 427 (1963).

⁴¹ In *Hoffa v. United States*, 385 U.S. 293 (1966), a similar technique was used. The agent who overheard the conversations later transcribed them for corroborative use.

⁴² 343 U.S. 747 (1952).

⁴³ *Lopez v. United States*, 373 U.S. 427, 439 (1963).

⁴⁴ 389 U.S. 347 (1967).

PLAIN VIEW

doing, saying, or hiding, will be private. If the individual takes certain actions or does certain things under circumstances he thinks will bring the shroud of privacy about them, and if these circumstances, viewed from an objective standpoint, are reasonable, then the actions are private and protected by the Fourth Amendment. Thus, Justice Harlan concurring stated:

[a man's home is private] but objects, activities, or statements he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.⁴

Thus, electronic devices may be used so long as they don't produce information which wouldn't be ordinarily discernible by an unaided human.

(c) *Other Devices.* A common device used to conduct long range interviews, to record bird calls, and other sounds is a parabolic microphone. It may or may not be electrically assisted, but its primary function is like that of a giant, supersensitive ear. It picks up, at long distances, sounds which would ordinarily be within human hearing range if a human were at the point of emission. No cases have been found covering this device but the following opinion is offered: the rationale of *Katz* and *Lopez* is that if an individual acts in a fashion not reasonably designed to be private, his acts will not be private. In *Lopez*, the conversation could have been ordinarily heard by third persons who could have reasonably been expected to be present. Thus, the conversation was not deemed private. In *Katz*, the telephone conversation would not have been ordinarily overheard by third persons or outsiders. To carry this to the parabolic microphone situation, one would say that if the device is used to pick up a conversation which could have been heard by outsiders who could reasonably have been expected to be within ordinary hearing range of the speaker, the conversation should be admissible. If, on the other hand, the conversation is in a fifth-story apartment, and the conversation is picked up with the parabolic microphone aimed through the open window of that apartment, the conversation should be inadmissible. One would ordinarily expect that at that height, no passers-by would be tall enough to hear. This analogy would seem to satisfy both *Lopez* and *Katz*, and, if the machine were in an acceptable place, the evidence produced thereby should be admissible. It should be noticed that in

⁴ *Id.* at 361.

60 MILITARY LAW REVIEW

this context, the parabolic microphone is to the ear what binoculars or a telescope is to the eye. It appears that the same analogy should apply.

4. *Degree of Perceptibility.*

How readily apparent must the evidence be? In the *Barone* case the police officers entered the room after hearing the screams, had to go to the bathroom, and had to look into the bowl of the toilet to see the evidence. It is obvious that no screaming person would be hiding in the toilet bowl, although the cause of the screaming, e.g., a weapon, might be small enough to be concealed there.

In *United States v. Decker*⁴⁶ the Court of Military Appeals spoke on the subject. Investigating the larceny and stripping of a car, a CID agent saw a junk car apparently full of goods. He got permission from the owner of the land on which the car was parked, and approached the car. He seized all of the items he saw in the passenger compartment of the car, opened the hood, and found and seized more. The court held that the stolen items seen through the windows, that is, the goods in the passenger compartment, were admissible, but the items not revealed until further exploration was conducted, were inadmissible. A warrant would have been necessary for seizure of the latter.

In *United States v. Conlon* the perceptibility question was similar to that in *Decker*. The OSI agent entered the garage in question and saw 2 kinds of items. The first type consisted of items like floor buffers which had the military unit identification stamped on the outside and were clearly identifiable as stolen. The second type consisted of items in boxes, wrapped in paper. Neither the boxes nor the paper gave any clue as to the contents. The items had to be completely unwrapped before they could be identified at all, let alone be identified as stolen property. The *Conlon* court made no distinction between the two types of items. *Decker*, coming later in time, appears to overrule in part the *Conlon* decision, at least insofar as the items which had to be unwrapped before identification are concerned.

In *United States v. Martinez*,⁴⁷ an Army Board of Review appeared to exclude items which had to be unwrapped from the plain view concept. Military policemen who were on patrol saw a suspicious car speeding in a parking lot. They stopped the car, ordered the occupants out, and asked for registration while one MP "flashed" his flashlight inside the car. The MP saw what he

⁴⁶ 16 U.S.C.M.A. 397, 37 C.M.R. 17 (1966).

⁴⁷ 41 C.M.R. 467 (ACMR 1969).

PLAIN VIEW

thought was a brown paper bag about 12" x 7 1/2", containing a 6-pack of beer. He reached inside and retrieved the package only to find it full of marihuana. A conviction for marihuana was overturned by the Board. They held that the seizure of weapons or other identifiable contraband in plain sight is acceptable, provided the item is plainly visible or has characteristics plainly visible. An innocent brown bag is not properly seizable.

The federal civilian cases present a similar view of wrapped packages. In *California v. Hurst*,⁴⁸ the police received a tip to go to Hurst's house. While one policeman was trying to get in the front door, another went to the rear. He saw a screen off a vent hole in the side of the house. In the 12" x 8" hole was a brown package. He then reached into the hole and pulled it out. Unwrapping the package, he found marihuana and other drugs. The court held the package inadmissible because all that was visible was an innocuous brown package.

Even if the investigator sees items clearly identifiable, he must have some reason to believe they are unlawful weapons, contraband, or other fruits of crime. In the *Garlich* case the investigating master-at-arms, when looking into the nonoperative vehicle, had no idea that the goods he seized were stolen. The court announced in dicta that even if he weren't a trespasser, he couldn't make a lawful seizure because he had no idea that the items were stolen.

A tangential set of circumstances is provided by *Stanley v. Georgia*⁴⁹ wherein the item was a movie. A search warrant was issued for bookmaking apparatus and a movie film was seized. The police concluded the film was obscene after projecting it for 50 minutes. The Supreme Court held that the Georgia statute prohibiting mere possession of obscene material was unconstitutional but in a concurring opinion Justices Stewart, Brennan, and White commented that while items in plain view could be seized in the execution of the search warrant for the bookmaking apparatus, the film wasn't in plain view because its purported criminality didn't become visually apparent until it was projected for 50 minutes.

5. Constructive Sight.

In *United States v. Welsch*⁵⁰ two federal agents were trying to buy drugs and sought out a potential seller. They entered his room at his invitation. The seller pulled out a large suitcase from

⁴⁸ 325 F.2d 891 (9th Cir. 1963).

⁴⁹ 394 U.S. 557 (1969).

⁵⁰ 446 F.2d 220 (10th Cir. 1971).

60 MILITARY LAW REVIEW

under the bed and exhibited a display of pills. One of the agents identified himself as the personal chemist of the other. The "personal chemist" agent took a few of the pills and left. He spent 15-20 minutes running field tests on the drugs which indicated the presence of LSD. The agents returned, arrested the seller, and seized the suitcase which once again had been placed under the bed *out of sight*. The 10th Circuit, in interpreting the *Coolidge*⁵¹ analysis of *Chimel v. California*⁵² said that the suitcase containing the drugs was in constructive plain sight.⁵³

It is unclear what the construction was. If it was meant by the court to be X-ray vision, based on an actual vision just a short time earlier, the construction is tangentially acceptable. If, on the other hand, the construction is the combination of actual sight of innocuous-looking pills and a chemical test, revealing contents, the construction is not acceptable, in the same sense as electronic amplification of otherwise indiscernible speech is unacceptable, under *Katz*.

6. Conclusion

It becomes immediately apparent that two guidelines operate: One for artificial illumination to aid sight, and one for all the others. The rationale of *Lopez*, that the scientific devices don't render the conversations or other evidence inadmissible so long as they could have been heard by an ordinary human who could expectably be in the area doesn't explain the flashlight and searchlight cases. The illumination allows the viewers to see what no human could see without light. The *Katz* doctrine of reasonable expectation may be the key. Artificial illumination, by torch, kerosene lamp, and electric light has been with us for a long time. Ordinary humans no longer reasonably expect that items on or near their person will go undetected simply because it is dark. Flashlights, street lights, domelights, and, conceivably, even searchlights at sea are part of man's technology which unintentionally has narrowed the sphere of individual privacy. The

⁵¹ *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

⁵² In *Chimel v. California*, 395 U.S. 752 (1969), the police arrested the accused in his home for burglary of a coin shop. After the arrest the police, without a search warrant, searched the entire three bedroom house, the garage, and the workshop. The Supreme Court held that searches incident to arrest are to be limited to the area under immediate control of the arrestee—to prevent his getting weapons and related items. In *Coolidge*, the Court further held that the plain view doctrine was not in conflict with the *Chimel* limitation so long as the view emanated from the delimited area. See 19, *supra*.

⁵³ *United States v. Welsch*, 446 F. 2d 220, 223 (10th Cir. 1971). One wonders what the agents would have done and the court said if *Welsch* had stored the suitcase somewhere other than its original hiding place.

PLAIN VIEW

courts in the early artificial light cases simply glossed over the substantial distinction between sunlight and artificial light, and no one took issue. Thus, the guideline for artificial light must be that artificial light used for ordinary illumination (probably not ultraviolet or infra-red) is treated as sunlight, and nighttime plain viewing is converted into daytime plain viewing.

The guideline for the electronic devices appears to be the "unaided human" test. If an unaided human who could reasonably be expected to be in the vicinity could hear, see, or smell the item, the additional of the device should have no bearing. Two facets of that guideline need further discussion. First, if the unaided human test is satisfied in that the noise was loud enough or the smell strong enough that the unaided human could have detected it, then the question is whether the unaided human could be expected to be there. Expected by whom? In view of this question, *Katz* becomes a truly significant case for it provides a cogent answer. Two parties must expect privacy or, in its converse here, the presence of our "unaided human." First, the accused must actually expect the privacy. If he does not actually expect privacy, he will not get it. In this setting, one must consider *Zap v. United States*.⁵⁴ Zap, a government contractor, was awarded a contract involving reimbursement by the government based on the submission of cost records by the contractor. As part of this contract, his books were to be subject to inspection to support the submitted cost records. Government inspectors, going through those cost records, found a false check used to support a claim for reimbursement. A conviction followed for the false claim. In this case, the Court held Zap could not claim privacy because he did actually expect it. In fact, he had contracted it away.

Second, the expectation of privacy is one that society must be prepared to accept as reasonable.⁵⁵ Society expects that public lobbies, streets, busses, and similar places are public. Conversation carried on there would be admissible if criminally incriminating and if overheard by our "unaided human" or, presumably, a surveillance device in the same spot. Any area, then, can be tested on a case by case basis, to see whether our "unaided

⁵⁴ 328 U.S. 624 (1946). The contract was a cost reimbursement type contract wherein, the contractor is reimbursed for his expenses after showing his books, at regular intervals, to government agents. Zap was inflating his costs by using a false check to support payment for costs never incurred. If one contracts knowing that part of the agreement is to supply cost records, placing incriminating material in those records is certainly not a safe nor private practice.

⁵⁵ *Katz v. United States*, 389 U.S. 347, 361 (1967).

human" could reasonably be there. If he could reasonably be there, any information detectable by his sensory ability should be admissible. The reason? The information has been ejected, from the standpoint of society, outside the accused's sphere of privacy. It should therefore make no difference if the information is retrieved by our "unaided human" or a surveillance device, so long as it is of an intensity that our "unaided human" could have sensed if he had been there.

C. INADVERTENCE

The court in *United States v. Welsch*, in dealing with the *Coolidge* phrases of "intend to seize" and "inadvertence," said that the terms mean "preexisting knowledge of the identity and location of an item sufficiently in advance of the seizure to permit the warrant to be applied for and issued."⁵⁶ Inadvertence means that the officer must stumble upon the evidence under unexpected circumstances. An example of such stumbling is found in *Stoner v. Myers*⁵⁷ where the police, with a good warrant to search the accused's house for fruits of a recent burglary, went to the front door, and getting no reply, went to the back. They got no reply there, either. Turning to leave, they saw evidence of the crime scattered about the yard. They had no expectation of such a yard display. The fruits of the yard search were held admissible.

In *Harris v. United States*,⁵⁸ the accused was arrested near his car. The car was searched and impounded. It later began to rain so a police officer entered the car in the impoundment lot to roll up the windows. In so doing, he saw the registration card of the car naming the victim of Harris's robbery. Mr. Justice Douglas concluded for the Court that the seizure was good because the car was seen inadvertently while the police were properly in the car,⁵⁹ neither trespassing nor searching.

A military case of significance gives some idea about the nature of the inadvertence. The requirement is not that the police agent must be unaware of the probable existence of a certain piece of evidence, but rather that he not know in advance that he will find it where he does. Thus, the finding or seeing must be inadvertent, not the knowledge of existence. In *United States v.*

⁵⁶ 446 F.2d 220, 223 (10th Cir. 1971).

⁵⁷ 329 F.2d 280 (3d Cir. 1964).

⁵⁸ 390 U.S. 234 (1968). This is not the Harris case overruled by *Chimel v. California*, 395 U.S. 752, 768 (1969).

⁵⁹ Compare this case with *Preston v. United States*, 376 U.S. 364 (1964). A police impoundment of the car and a search later at the impoundment lot is bad under the theory of no probable cause under the Carroll car theory, *Carroll v. United States*, 267 U.S. 132 (1925), and not incident to arrest.

PLAIN VIEW

Burnside,⁶⁰ the police had a good idea of the nature and description of the evidence. In chronological order, the facts were these: certain government cable was stolen; two state troopers then saw the accused at a dump, burning the insulation off the cable; they did not know the cable was stolen; they asked for the accused's identification and auto registration, but he hadn't any; he identified himself by name and duty station, a nearby air base; the police went to the air base, identified the accused and the car, and found out about the theft;⁶¹ the troopers, with the air police, went to the area where the accused lived; the area did not have regular house numbering, so the police had to ask around; upon their unsuccessful return from the most probable house, the police saw a pile of stolen cable. The court upheld the seizure under the plain view doctrine. They concluded that the entry to seize the cable was lawful for the police officers who knew of the contraband character of the cable, but held that one officer couldn't enter as he did not recognize the cable as stolen.⁶² This case fits squarely within the plain view doctrine requirements of recognition.

A test of inadvertence is often used by the federal courts: ease of getting a warrant. In *McDonald v. United States*,⁶³ it hardly could be said that the discovery of the equipment was inadvertent. The police knew of the type and location of the lottery equipment for two months prior to its seizure and intended to seize it. Yet on the appointed date, without a warrant, the police broke into the apartment building and went upstairs where they peered through the transom. After seeing what they thought they would, they entered and seized the equipment. The evidence was inadmissible, but three justices dissented, saying the plain view doctrine should apply,⁶⁴ even though a search warrant could have been secured.

Likewise, in *Trupiano v. United States*⁶⁵ the federal liquor agents had knowledge through an undercover agent that the still was operating for about one month prior to the seizure. The seizure, based in part on plain smell, was invalid as there was great ease of getting a warrant—no inadvertence. The Court

⁶⁰ 15 U.S.C.M.A. 326, 35 C.M.R. 298 (1958).

⁶¹ *Id.* at 301.

⁶² *Id.* at 305.

⁶³ 335 U.S. 451 (1948).

⁶⁴ Later cases such as *Katz v. United States*, 389 U.S. 347 (1967) and *Wattenburg v. United States*, 388 F.2d 853 (9th Cir. 1968), suggest that climbing up to look through a transom is not plainly viewing, nor is walking on tip toes to look over a high fence.

⁶⁵ 334 U.S. 699 (1948).

said that the equipment was heavy and several agents could have been posted while others got the warrant. The theory was earlier espoused by the Supreme Court in *Taylor v. United States*,⁶⁶ this time concerning not the whole manufacturing plant, but only 122 cases of alcohol. In *United States v. Scott*,⁶⁷ the district court said that police, investigating a robbery and finding stolen goods in the accused's room, could easily have posted one policeman while the other got a warrant. Thus, the overall inadvertency is tempered by a sense of urgency and the possible destruction or disappearance of the evidence.⁶⁸

D. RATIONALE OF THE PLAIN VIEW SEARCH

There are two justifications for the doctrine, because there are two separate and distinct types of plain view seizures. The easier is the conventional plain view situation, in which the viewers, lawfully about their business, see a seizable item. The rationale is that since they were able to see it from this non-private (in the sense of constitutionally protected by the Fourth Amendment) place, the object was not within the sphere of privacy. That being the case, no privacy is invaded, and constitutional search questions don't arise. The only questions which must be treated are these: 1. Was the view from a lawfully occupied spot? 2. Was the view made without unauthorized surveillance devices? and 3. Was the view inadvertent—not anticipated? A subquestion of inadvertency, a sort of test of the true inadvertency, is a consideration of whether a warrant was

⁶⁶ 286 U.S. 1 (1932).

⁶⁷ 149 F.Supp. 837 (DDC 1957).

⁶⁸ This theory was first announced in *Carroll v. United States*, 267 U.S. 132 (1925), in which an auto containing illegal alcohol was seized on the basis of prior tips and the location of the car in the "alcohol belt" (between Detroit and Grand Rapids, Michigan). The Court used a balancing test to validate a "probable cause" search of the car without a warrant. Likewise, in *Brinegar v. United States*, 338 U.S. 160 (1949), a car was stopped and searched after a high speed chase ending in a crash. Although alcohol was in plain view after the crash, the Court used the *Carroll* doctrine to justify the warrantless search of the car. In *Carroll*, the theory of disappearance of the evidence was also advanced. In *Brinegar*, the car was barely operable after the crash. In the military, cars bear some special significance, also. In *United States v. Summers*, 18 U.S.C.M.A. 573, 33 C.M.R. 105 (1963), the police saw the accused's car in a parking lot. Because of past burglaries, the suspicious appearance of the accused in the car, and the time of day (0130 hours), the police investigated. The accused was asked out. As he was getting out, one of the police flashed his light into the car, saw a .45 pistol, and seized it. The seizure was good, said the court, using *Carroll* rather than plain view language. That same confusion was reiterated in *United States v. Martinez*, 41 C.M.R. 467 (ACMR 1969) when the court said that a brief look into the car for weapons was acceptable but at the same time set aside a seizure of drugs in an innocuous package.

PLAIN VIEW

easily attainable. If those three questions can be answered in the affirmative, the seizure is lawful.

The more difficult rationale is that arising out of plain view searches made in the course of another intrusion into one's sphere of privacy. Examples are the *Ker* case, when the police are intruding with a warrant and then see additional items, or when police, conducting a valid search incident to arrest, see another item. The items then seen and ultimately seized are within one's sphere of privacy. Every Fourth Amendment protection ought to attach, but they don't. Instead, the only questions asked are those aimed at the initial intrusion.

The plain view doctrine applied to the special class situation then enlarges the scope of the search, and the enlargement has not been premised by authorization, or showing of probable cause. The only justification for such use of the plain view doctrine is necessity and practicality. Further, the pre-*Chimel* arguments about scope of searches incident to arrest were made by Mr. Justice Stewart in *Coolidge*⁶⁰ while in the same breath he denied that the use of plain view in that situation enlarged the initial intrusion. In view of the sanctity of one's sphere of privacy, no matter how small it may be, and the line of cases leading up to the restricted scope of searches incident to arrest, it appears that use of plain view methods to render evidence admissible, when the plain view occurs as a result of execution of another warrant, or an on-the-spot arrest, will also be narrowly restricted.

III. THE ADMINISTRATIVE SEARCH

Paragraph 152, MCM, 1969, mentions a particular type of search peculiarly applicable to the military, and often misunderstood. These searches are, according to manual definition, "administrative inspections or inventories conducted in accordance with law, regulation, or custom." Insofar as this mode of discovery is used to produce evidence for a criminal trial, it must be carefully examined to ascertain what, if any, authority permits such a search when the Fourth Amendment requirements of warrant and probable cause clearly are not met. If the administrative inspection cannot rely on some existing lawful search theory, its use to produce evidence at a criminal trial is untenable. The simple answer that "it's an administrative search" is not sufficient but only question-begging. The real authority and its limits must be examined.

⁶⁰ *Coolidge v. New Hampshire*, 403 U.S. 443, 468 (1971).

60 MILITARY LAW REVIEW

Several theories have been postulated for the legality of the administrative search. The first is that the lockers, containers, and the barracks itself are government property, with the conclusion that government agents, responsible for the property, may make inspections of it.⁷⁰ Moreover, since the property is government property, transient users of the property may not be in a position to object. Another theory is that such searches are simply within a commander's inherent power.⁷¹ This theory, aside from the question begging aspect, suggests that the inherent power arises from the inherent responsibility of the commander to maintain certain minimum living conditions.⁷² One writer further adds that the theory of maintaining basic threshold of living conditions in the military has its counterpart in analogous situations in the civilian community.⁷³

The government property theory has had only marginal development in the federal courts.⁷⁴ That theory seems to require that the government right to invade one's sphere of privacy be knowingly contracted away under conditions in which the individual could refuse. In the military, members living in barracks have no right to refuse to submit their living space to scrutiny. On the other hand, military courts have recognized that there is some sphere of privacy which surrounds even the individual soldier in the barracks, and this right withstands exploratory searches or fishing expeditions.⁷⁵ If an individual does have some recognized sphere of privacy about him, and if all the property about him is government issue, it follows that the label of government property does not allow fishing expedition penetrations.

The social well being theory had federal support through the reign of *Frank v. Maryland*.⁷⁶ That case allowed prosecution for failure to admit an inspector to a house for the conduct of an administrative inspection, although the inspector had no warrant. The Supreme Court suggested that the administrative search without warrant was necessary because of "the need to maintain basic, minimal standards of housing, to prevent the spread of disease and of that pervasive breakdown in the fibre of

⁷⁰ *United States v. Gebhart*, 10 U.S.C.M.A. 606, 28 C.M.R. 172 (1959).

⁷¹ *United States v. Brown*, 10 U.S.C.M.A. 482, 28 C.M.R. 48 (1959).

⁷² *United States v. Grace*, 19 U.S.C.M.A. 409, 410, 42 C.M.R. 11, 12 (1970).

⁷³ Hamel, *Military Search and Seizure—Probable Cause Requirement*, 39 MIL. L. REV. 41, 79 (1968).

⁷⁴ *Zap v. United States*, 328 U.S. 624 (1946).

⁷⁵ See Hamel, *supra* note 73 at 81-82.

⁷⁶ 359 U.S. 360 (1959).

PLAIN VIEW

people. . ." " providing that "[n]o evidence for criminal prosecution is sought to be seized." ⁷⁸ This view has been specifically accepted by the Court of Military Appeals ⁷⁹ as late as 1970, but it is interesting to note that the Supreme Court changed its position after issuing the *Frank* decision.⁸⁰ The specific reason given for the reversal is that administrative inspections are indeed "significant intrusions" ⁸¹ into one's sphere of privacy. Thus, in federal courts, when one puts into the balance social requirements of the maintenance of minimum living conditions and the social requirement of privacy, privacy now is favored.⁸²

In conclusion, while military courts continue to uphold the administrative search,⁸³ the Supreme Court has withdrawn federal support for the commonly suggested analogy.⁸⁴ Such withdrawal, however is not fatal to the military administrative inspection. The basic reason for the administrative inspection is to insure conformity with certain minimum levels of living and readiness. To that end, corrections in conduct are made, and confiscations of property occur. The aim of the confiscation is not the prosecution of the "offender" for possession of the item but rather removal of the item from the environment so that the required state of living and readiness is assured. While the Supreme Court, in being faced with the trade off of minimum social and physical standards for privacy, had to evaluate the relative value of the two interests to every walk of society in the military, the balance ought rationally to come out the other way. A narrow section of society is to be considered. This group is composed largely of young persons artificially removed from their regular environment, preened to a high state of physical acuity, placed in a foreign environment, and maintained specifically for the military mission of constituting a ready and able fighting force. To this end, population density is increased, and material uni-

⁷⁷ *Id.* at 371.

⁷⁸ *Id.* at 366.

⁷⁹ *United States v. Grace*, 19 U.S.C.M.A. 409, 410, 42 C.M.R. 11, 12 (1970).

⁸⁰ *See Camara v. Municipal Court*, 387 U.S. 523 (1967), and *See v. Seattle*, 387 U.S. 541 (1967).

⁸¹ *Camara v. Municipal Court*, 387 U.S. 523, 534 (1967).

⁸² Another writer has simply given up. Writing after the *See* and *Camara* decisions, he sees no viable pillar of support for the military administrative search and suggests that the old pillars supporting the probable cause search be extended to justify the administrative search. *Hunt, Inspections*, 54 MIL LAW REV. 225 (1971).

⁸³ *See United States v. Grace*, 19 U.S.C.M.A. 409, 410, 42 C.M.R. 11, 12 (1970) and cases cited theret.

⁸⁴ *But see Wyman v. James*, 400 U.S. 309 (1971) upholding an administrative inspection as a prerequisite to receiving welfare payments.

formity is required, both for service and known effectiveness, and for supply, repair, and replacement. Thus, the logical necessity of constant surveillance of a military force, and the special nature of the societal group composed of the soldiers, requires that privacy, in its common definition, be substantially more limited. To hold otherwise would be to obviate the capability of a military force. In addition, once the basic justification for the continued administrative search is accepted, its continuance has a certain boot strapping effect. Soldiers will no longer rely on any expectation of privacy as to barracks, lockers, and other such containers. Thus, the inspection, in *Katz* language, would neither penetrate a subjectively expected sphere of privacy, nor an objectively concluded sphere of privacy.

What is a good administrative search? If in practice, no regular administrative searches for the promotion of unit effectiveness are conducted, but, upon receipt of information concerning certain stolen items, a search for those items is begun under the guise of calling such a search an administrative inspection, attaching the name *administrative* will not save a bad fishing expedition.⁵⁵ On the other hand, if a unit practices regular administrative inspections and, in the conduct of one, information is received about the possible possession of contraband by a person *to be inspected*, the receipt of that information does not render the administrative search as to that person bad.⁵⁶ Thus, the basic motive for the beginning of the administrative inspection is the key. If it fits into a regular program of supervision aimed at promoting or maintaining the efficiency of the unit criminal prosecution is not the goal), items found may be the proper bases for prosecution. If, instead, the administrative inspection is used on an *ad hoc* basis to permit searches that could not be preceded by a warrant, evidence produced will not be admissible.

If a commander or his agent may lawfully conduct such an inspection, he is lawfully present inside of what we would ordinarily (that is, outside of the military environment) consider one's sphere of privacy. Once lawfully inside, the plain view doctrine would authorize both the seizure and later admission into evidence of the item seized.

It is also interesting to note that if the *Katz* theory of expectation is the true rationale for the plain view doctrine, then the regular conduct of the administrative inspections would limit the expectable sphere of privacy to a larger degree, thus bringing more vitality to the plain view doctrine so applied.

⁵⁵ *United States v. Lange*, 15 U.S.C.M.A. 486, 35 C.M.R. 458 (1965).

⁵⁶ *United States v. Grace*, 19 U.S.C.M.A. 409, 42 C.M.R. 11 (1970).

PLAIN VIEW

IV. CONCLUSIONS

From the foregoing study, it appears that the plain view search in the military appears in three principal forms. Two of these forms are related, both dealing with a careful analysis of whether the securing of the evidence was really a search at all. That is, if the items found and seized are outside an ascertainable sphere of privacy, and one concludes that Fourth Amendment protections do not obtain, that conclusion really means that there was no search—there was simply an observation and collection of goods in the public domain. In the military, those two forms are the administrative inspection and the traditional plain view searches.

The third form of the plain view search is the search and seizure of items by police agents while they are actually penetrating an individual's privacy, albeit lawfully. In this area fall plain view searches of things observable during the conduct of an arrest with or without a warrant, or the conduct of a search pursuant to a warrant. In this setting, the courts have thus far offset the evils of enlarging, without constitutional search safeguards, the scope of an authorized search against the practical disadvantages of requiring the police, when seeing the additional items, to stop and reinstitute formal search machinery before taking the unanticipated items.

The major concern of lawyers and laymen in the present social environment is the degree to which privacy is being whittled away. While courts may be hailed as being the last bastions of privacy, the courts are limited by social progress. If George Orwell⁸⁷ is as accurate as most science fictions writers seem to have been, it will only be a matter of time before some governmental agency will have every facet of every life under complete surveillance. Once that occurs, if a plain view concept still exists, the Fourth Amendment will be meaningless because there will be no privacy to protect. On the other hand, perhaps some artificial limit on the scope of surveillance will develop, so that persons and things, once within the fixed geometric enclosure, will be free from view.

Of more immediate concern is the peculiar role of the military administrative inspection when considered as a plain view search. Military authorities may adjust the degree of privacy of barracks life. Regular inspections, of ever-enlarging scope and frequency, can delimit the sphere of impenetrable privacy and thus provide the foundation for lawful seizure. A commander wishing

⁸⁷ G. ORWELL, NINETEEN EIGHTY-FOUR (1949).

to use this device simply need begin and follow through with such a program. The only requirement is that the inspections be grounded in a desire to promote operational effectiveness. Since every commander is interested in this goal, that requirement is easy to satisfy. No court has yet considered the proposition that one promotes operational effectiveness by the suppression of crime, and therefore, the very search for evidence useful in prosecution is part of the proper scope of administrative inspections. The answer is that some methods of evidence collection have proven so onerous when measured by the rights and privileges lost as a result of their exercise, that the method is prohibited for reasons not related to reliability of the evidence so produced.⁸⁸ Before the absolute confrontation is reached in the military, much may be done to limit the expectable sphere of privacy under legitimate guise.

Once a lawful penetration of privacy has occurred, the police may seize whatever else they reasonably see. This doctrine applies to warrantless arrests⁸⁹ as well as those pursuant to warrant. The justification for this concept is that although search-like intrusions are evil, they become justified after a prior determination of necessity.⁹⁰ Thus, Justice Stewart in *Coolidge*,⁹¹ suggests that the plain view theory is acceptable because it does not occur until a lawful search is in progress. The proposition is defective, however for a search justified when directed at the seizure of item A, is unjustified when directed at the seizure of item B. Since the evidence authorizing the search dealt with the accused's suspected criminality regarding item A, it presumably did not deal with his suspected criminality regarding item B. Lawful entry to search for item A, therefore, cannot be lawful entry to search for item B, unless a "bad man" test is adopted. That is, once an individual is determined to be in possession of one kind of criminal goods, a wholesale rummage is acceptable. That theory is not law.⁹² Only two justifications remain: safety of police and convenience. Searches incident to arrest, and stop and frisk statutes have been justified on the basis of the need to control immediately the area within the arrested person's reach, thus preventing his possible access to weapons.⁹³ Plain view seizures of weapons outside the sphere of "immediate control" of the ar-

⁸⁸ *Entick v. Carrington*, 19 Howell's St. Tr. 1029 (1765).

⁸⁹ See note 19, *supra*.

⁹⁰ *Coolidge v. New Hampshire*, 403 U.S. 448 (1971).

⁹¹ *Id.* at 467.

⁹² See note 17, *supra*.

⁹³ See note 19, *supra*.

PLAIN VIEW

rested persons would not be justifiable under the safety of police theory because by definition they are outside the accused's control. If they were within it, they'd be seizable under the incident to arrest theory; if outside, they pose no danger. Thus, convenience seems to be the only remaining rationale. What is convenience? Is it a function of the possible disappearance of the evidence? Does it relate to the amount of burden on police to secure traditional search permission? The questions are easy but the answers are impossible. I submit that disappearance of the evidence and convenience are not acceptable grounds to authorize a further invasion of one's privacy. Safety of the police officer is enough. A search warrant is not a key to the door of an individual's domain, but rather a license to enter upon certain terms and conditions, namely, the conduct of a search reasonably designed to produce a particular item. Unless the Fourth Amendment requirement of search based on probable cause is to be meaningless, the plain view theory, in its application to seizures made inside of an individual's sphere of privacy, ought to be abandoned.



COMMENTS

ABSOLUTE LIABILITY UNDER THE FEDERAL TORT CLAIMS ACT*

By Major Fred K. Morrison**

I. INTRODUCTION

In *Laird v. Nelms*,¹ decided in June 1972, the Supreme Court put to rest any lingering notion that there might be room for the imposition of absolute liability under the Federal Tort Claims Act. Prior to this decision, there were indications that the Supreme Court had abandoned an earlier prohibition against absolute liability. The Fourth Circuit Court of Appeals had held that in an action under the Federal Tort Claims Act² the United States was liable for damage resulting from sonic booms generated by Air Force flights.³ After holding that the discretionary function exception to the Tort Claims Act was not applicable, the court found the United States liable based on the conclusion that the

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¹406 U.S. 797 (1972).

²28 U.S.C. § 1346(b) (1970), in pertinent part reads:

"Subject to the provisions of chapter 171 [§§ 2671-80] of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

Id. § 2674 reads:

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

³Nelms v. Laird, 442 F.2d 1163 (4th Cir. 1971).

60 MILITARY LAW REVIEW

common law of North Carolina⁴ would impose strict liability on a private person for damage caused by supersonic flights.⁵ For a little more than a year this decision raised the puzzling and important question of the existence of absolute liability under the Tort Claims Act. While most of the commentators⁶ and the vast majority of the courts agreed that in its present form the Federal Tort Claims Act did not permit the imposition of absolute liability,⁷ the regularity and enthusiasm of the arguments for its adoption gave it the appearance of an idea whose time had come. However, the Supreme Court's holding in *Nelms* is a clear statement that there is no absolute liability under the present Federal Tort Claims Act.

A. PURPOSE OF THE FEDERAL TORT CLAIMS ACT

The Federal Tort Claims Act was passed in 1946, in order to eliminate the unjust consequences of sovereign immunity. Since the federal government had become the largest single employer in the country, it was inevitable that in the course of its conducting the nation's business accidents would occur and the United States would be responsible for injuring a great many of its citizens. Although the Congress had long recognized its moral obligation to compensate those injured by the wrongful acts of government employees, the primary method for compensating the victims of government torts was through private relief legislation. This method of affording relief was extremely time-consuming and inefficient. The Congress had far more critical tasks calling for attention and in the words of John Quincy Adams, "[a] deliberative assembly is the worst of all tribunals

⁴The place where the wrongful act or omission occurred. See 28 U.S.C. § 1346(b) (1970).

⁵*Nelms v. Laird*, 442 F.2d 1163, 1168-69 (4th Cir. 1971).

⁶2 F. HARPER AND F. JAMES, *THE LAW OF TORTS*, 856-60 (1956); W. PROSSER, *LAW OF TORTS*, 974-75 (4th Ed. 1971); Davis, *Tort Liability of Governmental Units*, 40 MINN. L. REV. 751, 791 and note 174 (1956); Jacoby, *Absolute Liability Under The Federal Tort Claims Act*, 24 FED. B. J. 139 (1964); Jacoby, *Absolute Liability Under The Federal Tort Claims Act—Part II*, 26 FED. B. J. 5 (1966); Seavey, "Liberal Construction" and *The Tort Liability of The Federal Government*, 67 HARV. L. REV. 994, 996-99 (1954). But see, Peck, *Absolute Liability and The Federal Tort Claims Act*, 9 STAN. L. REV. 433 (1957).

⁷*Fentress v. United States*, 431 F.2d 824 (7th Cir. 1970); *Goway v. United States*, 412 F.2d 525 (6th Cir. 1969); *Emelwon Inc. v. United States*, 391 F.2d 9 (5th Cir. 1968); *Bartholomae Corp. v. United States*, 253 F.2d 716 (9th Cir. 1957); *Harris v. United States*, 205 F.2d 765 (10th Cir. 1953); *United States v. Hull*, 195 F.2d 64 (1st Cir. 1952); *Ward v. United States*, 331 F. Supp. 369. (W.D. Pa. 1971); *Ashley v. United States*, 215 F. Supp. 39 (D. Neb. 1963).

ABSOLUTE LIABILITY

for the administration of justice."⁹ Thus, the Tort Claims Act in addition to compensating the victims of government torts removed an extremely wearisome burden from the shoulder of the Congress.

B. ABSOLUTE LIABILITY

Ever since the celebrated English decision of *Rylands v. Fletcher*,¹⁰ the doctrine of absolute liability, particularly as applied to those engaged in abnormally dangerous activities has been growing in the United States. The theory underlying the doctrine of absolute liability is that while abnormally dangerous activities may not be illegal and may even have beneficial results, these activities should pay their own way. Thus, even though an individual who is engaged in an activity such as blasting or flying an airplane cannot with the utmost care and skill prevent some accidents, he should nevertheless, be responsible to those that are injured as a result of his activities. Absolute liability then, is the price to be paid for the privilege of engaging in abnormally hazardous activities. In one form or another, frequently on a nuisance theory, the basic principle of absolute liability has been accepted in virtually all American jurisdictions.¹¹

C. ABSOLUTE LIABILITY AND THE F.T.C.A.

When the Federal Tort Claims Act was passed in 1946, the question soon arose whether the Act would permit recovery under a theory of absolute liability. While the Act appeared to make the United States liable in the same manner and extent as a private individual, the Act's requirement that the injury be "caused by the negligent or wrongful act or omission of any employee of the Government"¹² caused the courts to question the existence of absolute liability which by definition eliminates the necessity for proving negligence. Prior to the decisive Supreme Court decision of *Dalehite v. United States*,¹³ two Federal District Courts had stated that the words "wrongful Act" included those acts for which the United States may be absolutely liable. In *Parcell v. United States*,¹⁴ a case involving an airplane crash, the court stated in dicta,¹⁵ that to say that "wrongful act" equals

⁹ MEMOIRS OF JOHN QUINCY ADAMS, 479-80 (1876).

¹⁰ L.R. 3 H.L. 330 (1868).

¹¹ PROSSER, *supra*, note 6 at 505-16.

¹² 28 U.S.C. § 1346(b) (1970).

¹³ 346 U.S. 15 (1953).

¹⁴ 104 F. Supp. 110 (S.D. W. Va. 1951).

¹⁵ *Id.* at 116. The actual holding was based on the inability of the United

60 MILITARY LAW REVIEW

negligence would be inconsistent with the rule of statutory interpretation that no portion of a statute susceptible of meaning is to be treated as superfluous. In the other case, *Boyce v. United States*,¹⁵ the United States was sued for property damage caused by the efforts of the United States to deepen the channel of the Mississippi River with dynamite blasting. Although the court denied recovery on the theory that this activity came within the discretionary function exception to the Tort Claims Act,¹⁶ the opinion stated that the use of a dangerous instrumentality so as to damage the property of another would constitute a wrongful act under the statute.

These two decisions were like voices crying in the wilderness. The vast majority of the early cases held that there could be no recovery based on absolute liability under the Federal Tort Claims Act.¹⁷

D. DALEHITE V. UNITED STATES

In 1953, the Supreme Court appeared to have settled the question by clearly denying the existence of absolute liability under the Tort Claims Act. The celebrated case of *Dalehite v. United States* arose out the explosion at Texas City, Texas, of two government ships filled with fertilizer grade ammonium nitrate. While the Court's holding denying liability for the Texas City disaster was based on the discretionary function exception, the Court in *dicta*¹⁸ clearly rejected any suggestion of imposing absolute liability under the Tort Claims Act. Justice Reed speaking for the majority stated:

there is yet to be disposed of some slight residue of theory of absolute liability without fault. . . . We agreed . . . that the Act does not extend to such situations, though of course well known in tort law generally. It is to be invoked only on a "negligent or wrongful act or omission" of an employee. Absolute liability, of course, arises irrespective of how the tortfeasor conducts himself; it is imposed automatically when any damages are sustained as a

States to overcome the inference of negligence supplied by the application of *res ipsa loquitur*.

¹⁵ 93 F. Supp. 866 (S.D. Iowa 1950).

¹⁶ 28 U.S.C. § 2680(a) (1970).

¹⁷ See, e.g., *Heale v. United States*, 207 F.2d 414 (3rd Cir. 1953); *Harris v. United States*, 205 F.2d 765 (10th Cir. 1953); *United States v. Inmon*, 205 F.2d 681 (5th Cir. 1953); *United States v. Hull*, 195 F.2d 64 (1st Cir. 1952); *Danner v. United States*, 114 F. Supp. 477 (W.D. Mo. 1953).

¹⁸ As the basis for denying liability for the Texas City Disaster was the discretionary function exception, the discussion of absolute liability can properly be considered *dicta*. 2. F. HARPER & F. JAMES, THE LAW OF TORTS, 856-57 (1956); *Jacoby, supra*, note 6, 24 FED. B.J. at 140.

ABSOLUTE LIABILITY

result of the decision to engage in the dangerous activity. The degree of care used in performing the activity is irrelevant to the application of that doctrine. But the statute requires a negligent act. . . . Petitioners rely on the word "wrongful" though as showing that something in addition to negligence is covered. This argument . . . does not override the fact that the Act does require some brand of misfeasance or nonfeasance, and so could not extend to liability without fault; in addition, the legislative history of the word indicates clearly that it was not added to the jurisdictional grant with any overtones of the absolute liability theory. Rather, Committee discussion indicates that it had a much narrower inspiration: "trespasses" which might not be considered strictly negligent. . . . Had an absolute liability theory been intended to have been injected into the Act, much more suitable models could have been found, see e.g., the Suits in Admiralty Act . . . in regard to maintenance and cure.²⁰

In spite of the clear language of *Dalehite*, the Fourth Circuit Court of Appeals continued to allow recovery based on absolute liability theories. In *United States v. Praylou*,²¹ decided one year after *Dalehite*, the Court bravely attempted to distinguish away *Dalehite*. The case involved damages caused by the crash of a government aircraft. The court affirmed liability against the United States, without proof of negligence, based on the state enactment of the Uniform Aeronautics Act²² which imposed absolute liability for damage caused by flying aircraft. The court held that the word "wrongful" includes all tortious "acts"²³ and then mistakenly attempted to limit *Dalehite* to situations involving the possession of dangerous property.²⁴

The Fourth Circuit decision in *Nelms v. Laird* mentioned earlier also attempted to distinguish *Dalehite*, and the many

²⁰ 346 U.S. 15 44-45 (1953).

²¹ 208 F.2d 291 (4th Cir. 1953), cert. denied, 347 U.S. 934 (1954), Noted in 23 GEO WASH L. REV. 106 (1954).

²² Section 5 of the Uniform Aeronautics Act, which is incorporated in the South Carolina Code, provides:

The owner of every aircraft which is operated over the land or waters of this State is absolutely liable for injuries to persons or property on the land or water beneath cause by ascent, descent or flight of the aircraft or the dropping or falling of any object therefrom, whether such owner was negligent or not, unless the injury is caused in whole or in part by the negligence of the person injured or of the owner or bailee of the property injured. . . . S.C. Code Ann. § 2-6 (1952).

²³ *United States v. Praylou*, 208 F.2d 291, 293 (4th Cir. 1953):

As said in the A.L.I. Restatement of Torts, p. 16, the word "tortious", which means wrongful, "is appropriate to describe not only an act which is intended to cause an invasion of an interest legally protected against intentional invasion, or conduct which is negligent as creating an unreasonable risk of invasion of such an interest, but also conduct which is carried on at the risk that the actor shall be subject to liability for harm caused thereby, although no such harm is intended and the harm cannot be prevented by any precautions or care which it is practicable to require."

²⁴ *Id.* at 295.

60 MILITARY LAW REVIEW

cases that had relied on *Dalehite*, to hold that sonic boom damage was covered by the discretionary function exception to the Tort Claims Act. The court stated that unlike the Texas City Explosion in *Dalehite*, the danger of sonic boom damage was clearly foreseeable. The court proposed "[t]he inability to prevent a deliberately released destructive force from causing harm" as an outer limit to the application of the discretionary function exception.²⁴

Outside the Fourth Circuit, the courts have consistently adhered to the *Dalehite* dicta, although, as will be discussed later, the Supreme Court, itself, in a cryptic footnote in *Rayonier, Inc. v. United States*,²⁵ appeared to have opened the door to overruling *Dalehite* on the issue of absolute liability.

E. THE NEED FOR ABSOLUTE LIABILITY

Obviously, the Federal Government with its armed forces, space exploration, Atomic Energy Commission, crime fighting activities, and immense construction projects, is the greatest single participant in abnormally dangerous activities. To make the United States immune from absolute liability is to a large extent to emasculate the purpose of the Tort Claims Act. It might be argued that the extent of the government's abnormally dangerous activities is a good reason not to include these activities within the purview of the Act. However, this results in a continued need for private relief legislation²⁶ or it forces those injured by government activities to bear a burden that should fall on the public at large, that is the taxpayer.

It is arguable that any aspect of sovereign immunity is a denial of equal protection of the law. A recent example²⁷ of this reasoning was a suit against the Governor of Ohio for negligently ordering the National Guard to Kent State University at a time of such confusion that the order caused the death of four students. The Ohio Court of Appeals held that the doctrine of sovereign immunity was a violation of the Constitutional

²⁴ 442 F.2d 1163, 1167 (4th Cir. 1971). In *Ward v. United States*, 331 F. Supp. 369, 374-75 (WD Pa. 1971), a District Court decision subsequent to *Nelms*, the court held that this attempt to distinguish *Dalehite* was not "well founded." The court stated that the failure to comply with regulations was not dispositive of the issue of liability as the Air Force can not by its own internal regulations waive the discretionary function exception of the Tort Claims Act.

²⁵ 352 U.S. 315 (1957) at 319 note 2.

²⁶ The Texas City Disaster, for which relief was denied in *Dalehite* was the subject of private relief legislation.

²⁷ *Krause v. Ohio*, 40 U.S.L.W. 2196 (Ohio Ct. App. Sept. 30, 1971).

ABSOLUTE LIABILITY

right to equal protection of the laws.²⁸ The court reasoned that to deny recovery to the victim of a tort committed by the state and yet grant recovery to the victim of a comparable act committed by a private tortfeasor was a denial of equal protection, as the threat of tort responsibility was not a rational basis for the distinctions created by the doctrine of sovereign immunity.²⁹

If justice and the purpose of the Tort Claims Act require absolute liability, then assuming that the act does not allow the imposition of absolute liability, the Congress must have had good reasons to reject such a significant area of tort liability. The expression of these reasons, if they existed, should be found in the legislative history of the Act.

II. LEGISLATIVE HISTORY

An inquiry into the genesis of the phrase "negligent or wrongful act or omission," as used in the Tort Claims Act, does not yield a clear answer on the question of whether Congress intended to eliminate absolute liability.³⁰ In a tort claims act bill prepared but not passed in 1942,³¹ the House Judiciary Committee³² added the phrase "negligent or wrongful act or omission" to the Senate version of the bill.³³ The Senate bill would have made the United States liable only for negligent acts. The Committee report accompanying the House version stated that the additional language was preferred "as it would afford relief for certain acts or omissions which may be wrongful but not necessarily negligent."³⁴

²⁸ U.S. CONST. Amend. XIV, § 1, ". . . nor [shall any state] deny to any person within its jurisdiction the equal protection of the laws."

²⁹ Krause v. Ohio 40 U.S.L.W. 2196 (Ohio Ct. App., 30 Sept. 1971). In the words of the court:

If the threat of multiple suits is not a tenable basis for the distinctions created by the immunity, and we hold it is not, then there is none. The distinctions then depend upon a gossamer as frail as that supporting those distinctions founded on nationality or race. A distinction so based is capricious and represents no policy but an arbitrary attempt to lift state responsibility without reason. In such circumstances the permissible line between reasonable classification or a rational policy, and a denial of equal protection is crossed. This fatally offends the Constitution.

Ohio's doctrine of sovereign immunity has been held constitutional by the U.S. Supreme Court, Palmer v. Ohio, 248 U.S. 32 (1918). It should be noted that the Ohio Court of Appeals is an intermediate Appellate Court.

³⁰ This is frequently the case with legislative history, for if the legislators had been concerned with absolute liability they would have specifically provided for it, or included it in the exceptions from liability contained in 28 U.S.C. § 2680 (1970).

³¹ This bill did not become a law, but the same language was adopted into the bill passed in 1946, 28 U.S.C. § 1346(b) (1970).

³² H.R. Rep. No. 2245, 77th Cong., 2d Sess. 2 (1942).

³³ S.2221, 77th Cong., 2d. Sess. § 301 (1942).

³⁴ H.R. Rep. No. 2245, 77th Cong., 2d Sess. 11 (1942).

60 MILITARY LAW REVIEW

While engaging in an abnormally dangerous activity is not truly "wrongful" until an injury results, the theoretical basis for absolute liability is that the abnormally dangerous activity is sufficiently "wrongful" that the risk of any injury should fall on the person engaging in the dangerous activity. Thus, the Committee report's explanation of the reasons for adding the crucial phrase seems to support a construction of the statute that would allow the imposition of absolute liability. During the Senate hearings on the bill it was stated that the addition of the word "wrongful" would subject the government to liability for trespass.³⁵ Thus, the legislative history of the Tort Claims Act does indicate that the word "wrongful" was added to the statute in order to expand the government's liability beyond negligence. Trespass was specifically mentioned as one example of this increased liability.³⁶

The Tort Claims Act contains a list of many types of activities to which the F.T.C.A. waiver of sovereign immunity does not apply. Among the "exceptions" is a section which exempts the government from liability for most intentional torts.³⁷ Since the Congress thought it necessary to make a specific exception for most of the intentional torts, it seems clear that, in addition to trespass, other nonexempted intentional torts such as conversion should come within the meaning of the phrase "wrongful act." Both trespass and conversion possess aspects of absolute liability. New York and Texas still impose liability for invasions of property that are neither intentional nor negligent.³⁸ The Restatement of Torts would impose liability for unintentional and nonnegligent trespasses that result from an abnormally dangerous activity.³⁹ In conversion there need not exist an intent

³⁵ *Hearings Before a Subcommittee of the Senate on the Judiciary*, 76th Cong., 3d. Sess. 43-44 (1940).

³⁶ In *United States v. Gaidys*, 194 F.2d. 762 (10th Cir. 1952), the United States was held liable for damage resulting from a crash after an Air Force plane had, "trespassed" upon plaintiff's air space.

³⁷ 28 U.S.C. § 2680 (1970) reads:

The provisions of this chapter and section 1346(b) of this title shall not apply to— . . .

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

³⁸ *Wood v. United Airlines*, 32 Misc. 2d 955, 223 N.Y.S.2d 692, *aff'd* 16 App. Div. 2d 659, 226 N.Y.S.2d 1022; *appeal dismissed* 11 N.Y.2d 1053, 230 N.Y.S.2d 207, 184 N.E.2d 180 (1962) (crash of plane out of control). See W. PROSSER, *LAW OF TORTS* 68-65 (4th ed. 1971). 28 U.S.C. § 1346(b) (1970) makes the United States liable "if a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

³⁹ *RESTATEMENT (SECOND) OF TORTS* § 165 (1965).

ABSOLUTE LIABILITY

to do wrong, only the intent to exercise a dominion and control over goods that in fact turns out to be inconsistent with the rights of the plaintiff.⁴⁰ A mistake of law or fact is not a defense.⁴¹

Thus, the legislative history clearly indicates that Congress intended to impose one type of absolute liability, liability for trespass, upon the government. The failure to include other intentional torts such as conversion in the list of excepted activities implies that here too Congress intended to impose absolute liability when applicable.

Only in the discussion of the discretionary function exception, section 2680(a), does the legislative history specifically mention an intent to preclude certain types of absolute liability. Both the House and Senate reports stated:

This is a highly important exception, intended to preclude any possibility that the bill might be construed to authorize suit for damages against the Government growing out of an authorized activity, such as a flood-control or irrigation project, where no negligence on the part of any Government agent is shown, and the only ground for suit is the contention that the same conduct by a private individual would be tortious . . .⁴²

By its wording Section 2680(a) is limited to situations involving the execution of a statute or regulation, or the performance of a discretionary function. Therefore, both the denial of absolute liability in a specific situation and the use of the word "tortious" in the report can be construed to support absolute liability in other situations.

Nothing in the legislative history precludes the imposition of absolute liability. At the very worst, the Congressional deliberations are silent on the issue. The door is open for the courts to fill this void. Prior to the *Dalehite* decision several courts had held that it was quite reasonable to assume that the phrase "wrongful act" covered those acts for which the United States may be absolutely liable.⁴³ In *Parcell v. United States*,⁴⁴ the court stated:

⁴⁰ PROSSER, *SUPRA* note 6, at 83.

⁴¹ *Poggi v. Scott*, 167 Cal 372, 139 P. 815, 816 (1914). "The foundation for the action of conversion rests neither in the knowledge nor the intent of defendant. It rests upon the unwarranted interference by defendant with the dominion over the property of the plaintiff from which injury to the latter results. Therefore neither good faith nor bad faith, neither care nor negligence, neither knowledge nor ignorance, are the gist of the action."

⁴² S. Rep. No. 1196, 77th Cong., 2d. Sess. 7 (1942); H.R. Rep. No. 2245, 77th Cong., 2d. Sess. 10 (1942).

⁴³ *D'Anna v. United States*, 181 F.2d 335, 337 (4th Cir. 1950); *Boyce v. United States*, 93 F. Supp. 866 (D.C. Iowa 1950).

⁴⁴ 104 F. Supp. 110, 116 (S.D. W. Va. 1951).

To say that a tort giving rise to absolute liability is not a "wrongful act" would be a technical refinement of language incompatible with that liberal interpretation of the sovereign's waiver of immunity which the highest court in the land has admonished us to employ.

As the Tort Claims Act evidences the intent to make the government liable in these situations where a private person would be liable,⁴⁵ and as the purpose of the Act was to relieve Congress of the burden of private relief legislation,⁴⁶ the courts should have imposed absolute liability upon the government.

III. HAD DALEHITE BEEN OVERRULED PRIOR TO NELMS?

In *Nelms*, the Supreme Court relied on *Dalehite* as a clear precedent holding that absolute liability was not permitted by the Federal Tort Claims Act under any circumstances.⁴⁷ Prior to *Nelms*, the effect of *Dalehite* was not clear to all the courts

⁴⁵ 28 U.S.C. § 2674 (1970) quoted in note 1 *supra*.

⁴⁶ *Rayonier, Inc. v. United States*, 352 U.S. 315, 320 (1957); *Indian Towing Co. v. United States*, 350 U.S. 61, 68-69 (1951):

The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws. Of course, when dealing with a statute subjecting the Government to liability for potentially great sums of money, This Court must not promote profligacy by careless construction. Neither should it as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it.

The purpose of avoiding private relief legislation was made clear by President Franklin D. Roosevelt when he proposed the legislation on January 14, 1941,

They [Private Claim Bills] consume a great amount of the time of the Congress and the President, and give rise to considerable expense.

During the last 8 Congresses, almost 6,800 private claim bills were introduced, an average of more than 2,000 per Congress, of which less than 20 percent became law. And of all the bills which I vetoed during these Congresses, fully one-third were private claim bills.

It is estimated that the expenses of the executive and legislative branches in considering the claim bills of each Congress, excluding salaries of Congressmen, are in the neighborhood of \$125,000; that the printing costs alone of the claim bills which fail to become law are almost \$19,000 per Congress; and that it costs almost \$200 to pass a single bill. When it is considered that some claim bills are enacted in amounts much less than \$200, the wisdom of our present procedure is questionable.

As the Congress knows, this question has been considered many times before. During the past 20 years, Members of the Congress have frequently pointed out that the procedure for relief of tort claims by special act is slow, expensive, and unfair both to the Congress and to the claimant, and several attempts have been made to enact legislation submitting all negligence claims to administrative or judicial determination. The question arises why the Congress and the President should continue to devote so much time to the consideration and approval of these numerous individual cases.

Quoted in H.R. Rep. No. 2245, 77th Cong., 2d. Sess. 6 (1942).

⁴⁷ *Laird v. Nelms*, 406 U.S. 797, 800 (1972).

ABSOLUTE LIABILITY

and commentators.⁴⁸ Arguments were growing that the *Dalehite* prohibitions against absolute liability, be it holding or dicta, had been implicitly abandoned by the Supreme Court in *Rayonier, Inc. v. United States*.⁴⁹

As was mentioned, *United States v. Praylou*⁵⁰ held the United States absolutely liable for damage caused by flying aircraft. The court attempted to distinguish the decision from *Dalehite* by stating that *Dalehite* only applied to the possession of dangerous property and not to damage actually inflicted by government employees.⁵¹ The *Dalehite* opinion simply does not support the distinction made by the Fourth Circuit. If absolute liability were to be imposed it would be based on the abnormally dangerous nature of storing explosive fertilizer in *Dalehite*, or the abnormally dangerous nature of the act of flying an aircraft in *Praylou*. In both cases the conduct involved, was the type that is justifiable and frequently the subject of absolute liability for any harm caused.

Absolute liability was denied in *Dalehite*, not because of the nature of the conduct, but because the Court felt that the language of the Torts Claims Act required a "negligent or wrongful act or omission." The Court interpreted this phrase to require a showing of misfeasance or nonfeasance on the part of a government employee. Conduct that merely gave rise to absolute liability was held insufficient to impose liability.⁵² Thus, if liability without negligence was not proper in *Dalehite*, it should not have been proper in *Praylou*. Despite or, perhaps, because of, the clear conflict between *Dalehite* and *Praylou*, the Supreme Court denied certiorari.⁵³

Into this setting of clear conflict, the Supreme Court injected *Rayonier Inc. v. United States*,⁵⁴ which appeared to give the stamp of approval to *Praylou*. *Rayonier* involved the liability of the United States under the Tort Claims Act for the negligence of Forest Service Employees in permitting a fire to start

⁴⁸ *Pendergast v. United States*, 241 F.2d 687 (4th Cir. 1957); *United States v. Praylou*, 208 F.2d 291 (4th Cir. 1953); *Lorick v. United States*, 267 F. Supp 96 (D.S.C. 1967); *Long v. United States*, 241 F. Supp. 286 (D.S.C. 1965). See *Peck, supra* note 6 at 435; *Jacoby, supra* note 6 at 140; *Comment*, 31 So. CAL. L. REV. 259, 266 note 56 (1958); *Dostal, Aviation Law Under the Federal Tort Claims Act*, 24 Fed. Bar J. 165, 177-78 (1964).

⁴⁹ 352 U.S. 315 (1957).

⁵⁰ 208 F.2d 291 (4th Cir. 1953), *noted in* 23 GEO. WASH. L. REV. 106 (1954).

⁵¹ 208 F.2d at 295.

⁵² 346 U.S. 15, 44-45 (1953).

⁵³ *United States v. Praylou*, 347 U.S. 934 (1954).

⁵⁴ 352 U.S. 315 (1957).

60 MILITARY LAW REVIEW

on government land. While the principal holding of *Rayonier* was that the United States can not avoid liability on the ground that a municipal corporation would not be liable in a similar situation, the case was remanded to the District Court to determine whether a private person would be liable under statutes that according to the Court of Appeals for the Ninth Circuit⁵⁵ imposed liability without fault. The Court held that if a private person would be liable under the state statute, (that the Ninth Circuit held imposed liability without fault) then the United States would also be liable.⁵⁶ This decision can obviously be construed as supporting the imposition of absolute liability.

In the *Rayonier* opinion, the Court actually cites *Praylou* with apparent favor.⁵⁷ The citation is in a footnote that reads "c.f. United States v. *Praylou*, 208 F.2d 291, 294-295." Along with several other cases that are introduced by a *see also*, the citation of *Praylou* supports the textual statement, "[t]o the extent that there was anything to the contrary in the *Dalehite* Case it was necessarily rejected by *Indian Towing*."⁵⁸ The use of the signal *c.f.* indicates that the cited authority supports a statement, opinion, or conclusion of law different from that in the text but sufficiently analogous to lend some support to the text.⁵⁹ The supported text referred to the holding of *Indian Towing Co. v. United States*⁶⁰ that the liability of the United States under the Tort Claims Act is not restricted to the scope of liability to which a municipal corporation would be subject. The specific portions of *Praylou* that are cited in the footnote refer to the discussion that purports to limit *Dalehite* to situations where an attempt is being made to hold the government liable for the mere possession of dangerous property as opposed to cases where "the law of a state imposes absolute liability for . . . damage and not mere liability for negligence."⁶¹ Thus, the mysterious footnote should be read as saying that while the cited portion of *Praylou* refers to a different subject (absolute liability rather than the scope of the discretionary function exception) it is another analogous example of a proper

⁵⁵ *Rayonier Inc. v. United States*, 225 F.2d 642, 647-48 (9th Cir. 1955).

⁵⁶ *Rayonier Inc. v. United States*, 352 U.S. 315, 318 (1957).

⁵⁷ *Id.* at 319, note 2.

⁵⁸ *Id.*

⁵⁹ HARVARD LAW REVIEW ASSOCIATION, A UNIFORM SYSTEM OF CITATION, 87 (11th ed. 1967).

⁶⁰ 350 U.S. 61 (1955).

⁶¹ *United States v. Praylou*, 208 F.2d 291, 295 (4th Cir. 1953).

ABSOLUTE LIABILITY

limitation on *Dalehite*.⁶² Although the Supreme Court gave the other federal courts a justification for ignoring the *Dalehite* dicta and imposing absolute liability, only the courts in the Fourth Circuit did so.

This troublesome issue might have been resolved differently in 1957, when the Supreme Court granted certiorari in a case in which the Court of Appeals for the Ninth Circuit had denied recovery based on a state statute that imposed absolute liability for the operation of flying aircraft.⁶³ Unfortunately, the parties settled the case and a decision was never rendered.⁶⁴

The Supreme Court majority in *Nelms* ignored the implications of the *Rayonier* footnote, but the dissenting opinion written by Mr. Justice Stewart stated that subsequent decisions limiting the effect of *Dalehite* when taken together with *Rayonier*'s approving citation of *Praylou*,⁶⁵ have until today been generally understood to mean that the language in *Dalehite* rejecting the absolute liability doctrine had been implicitly abandoned.⁶⁶

IV. THE NEED FOR ABSOLUTE LIABILITY

A. INABILITY TO PROVE NEGLIGENCE UNDER LOCAL LAW

Since the Federal Tort Claims Act attempts to put the government in the position of a private person and then applies the law of the state where the tort occurs, the liability of the federal government will naturally vary from state to state. This will result in the inequity of a plaintiff being denied recovery in one state, while in another state a plaintiff with an identical claim may be granted a generous recovery. This type of inequity is part of the price of our federal system. However, the result of engrafting state tort laws onto the Tort Claims Act should not be an increase in the inequities inherent in our federal system. This is the result when the courts not only follow the state law

⁶² There can be no question that the Supreme Court was aware of the conflict between *Dalehite* and *Praylou*, for the Government's brief in *Rayonier* stated that *Praylou* was "wrong and in irreconcilable conflict with *Dalehite*." Brief for the United States, 30-31 n.11, *Rayonier Inc. v. United States*, 352 U.S. 315 (1957). *Dushen v. United States*, 243 F.2d 451, 454 (9th Cir. 1957), the only case to discuss the effect of *Rayonier* on *Dalehite*, stated that *Rayonier* in no way changed the principle that the government may not be held absolutely liable under the Tort Claims Act.

⁶³ *United States v. Taylor*, 236 F.2d 649 (6th Cir. 1956), cert. granted 352 U.S. 963 (1957).

⁶⁴ 353 U.S. 956 (1957).

⁶⁵ 406 U.S. 797, 805.

as to which acts produce tort liability, but because of their construction of the Tort Claims Act, they also feel constrained to adopt the particular theory of state law which leads to liability. If under state law a particular act gives rise to liability, the United States should be liable under the Tort Claims Act, regardless of the particular theory of tort law which leads to liability. It is enough that inequities result from the fact the laws of the states vary in their definition of tortious conduct. The inequity should not be compounded by making the liability of the federal government depend upon the theory under which a particular type of conduct is determined to be tortious. This is frequently the result of the refusal of courts to impose absolute liability under the Tort Claims Act. An example is the case where a plaintiff is denied the opportunity to even offer proof of negligence because the state law permits recovery only on a theory of absolute liability. This was the situation in *Konsler v. United States*,⁶⁶ where the plaintiff was injured in an automobile accident caused by a person who had become drunk at a Non-commissioned Officers Club. The plaintiff was denied recovery based on the Illinois Dram Shop Act that imposed absolute liability. He was then forbidden to sue on a theory of negligence since under state law the Dram Shop Act was the exclusive remedy.⁶⁷ Consider also the situation where a particular activity is considered so safe that an accident could only result from negligence. There, the plaintiff prevails through application of *res ipsa loquitur*, while a plaintiff injured by an activity that is so dangerous that it carried absolute liability is denied recovery. Thus, even if the plaintiff is not denied an opportunity to prove negligence as in *Konsler*, he is certainly deprived of the *res ipsa loquitur* inference of negligence. This useful inference may well have been available if the state law had not adopted a theory of absolute liability.

B. ELIMINATION OF JUDICIAL CIRCUMVENTION

Rather than accepting absolute liability, many courts attempt to circumvent the issue by dreaming up alternative theories of liability. This judicial circumvention results in an unequal and unpredictable application of the law that is bound to result in confusion and contempt for the judicial process.

1. *Res Ipsa Loquitur*—The courts have on occasion resorted to the doctrine of *res ipsa loquitur* in order to allow a recovery that it would have had to deny if based on absolute liability.

⁶⁶ 288 F. Supp. 895 (ND. Ill. 1968).

⁶⁷ *Id.* at 897.

ABSOLUTE LIABILITY

In *United States v. Hull*,⁶⁸ which specifically denied recovery based on absolute liability, the court allowed recovery through the application of *res ipsa loquitur* when a post office window fell and injured plaintiff's hand. Several other cases applying the doctrine have involved aircraft accidents.⁶⁹ In one case,⁷⁰ the court found liability through the inference of negligence supplied by *res ipsa loquitur* and then took the extremely inconsistent position that absolute liability was also applicable.⁷¹ Absolute liability is of course, based on the presumption that certain activity is extrahazardous; therefore, the participant in this hazardous activity is saddled with the burden of being liable for any damage he causes.⁷² *Res ipsa loquitur*, on the other hand, presumes that without negligence there would not have been an injury.⁷³ It is unjust to hold the government liable when the law of a state presumes that a particular activity, such as the operation of aircraft, is safe and yet refuses to find liability, in an identical situation, because the local law of another state declares the same activity to be ultrahazardous. Yet the law begins to look rather silly and illogical, if in an attempt to reach a just result the courts are forced to apply the doctrine of *res ipsa loquitur* to situations where the defendant's activity was so hazardous that, absent the artificial limitation imposed by the Tort Claims Act, the Court would have allowed recovery based on absolute liability.

2. Trespass—As previously mentioned, the legislative history of the Tort Claims Act states that at least one of the reasons that the House Judiciary Committee added the phrase "wrongful act or omission" to the Senate version of the bill, was to subject the government to liability for trespass.⁷⁴ Some courts

⁶⁸ 195 F.2d 64, 67 (1st Cir. 1952). Cited with approval in *Dalehite v. United States*, 346 U.S. 15, 45 (1953).

⁶⁹ *O'Connor v. United States*, 251 F.2d 939 (2d. Cir. 1958) (mid-air collision of two military aircraft in Oklahoma where there is no absolute liability for air plane crashes); *United States v. Kesinger*, 190 F.2d 529 (10th Cir. 1951); *D'Anna v. United States*, 181 F.2d 335, 337 (4th Cir. 1950) (Statutory presumption of negligence raised by the fall of a gasoline tank from a Navy plane—no absolute liability under Maryland law).

⁷⁰ *Parcell v. United States*, 104 F. Supp. 110 (S.D. W. Va. 1951).

⁷¹ *Id.* at 115.

⁷² *PROSSER*, *supra* note 6 at 505-16.

⁷³ *Id.* at 214.

⁷⁴ *Hearings Before a Subcommittee on the Judiciary, 76th Cong., 3rd Sess.* 43-44 (1940). In *United States v. Ure*, 225 F.2d 709, 711 (9th Cir. 1955), the court relied on *Dalehite* to deny liability for a non-negligent trespass, because it was indistinguishable from absolute liability. (Despite the fact that *Dalehite* cites the Senate Committee Hearings, 346 U.S. 15, 45 (1953).

60 MILITARY LAW REVIEW

have used this example of "legislative intent" to hold the government liable for a nonnegligent and unintentional trespass. In most cases this is a form of absolute liability. For example, in *United States v. Gaidys*,⁷⁵ the United States was held liable for damage caused by the crash of an airplane on plaintiff's land. The court's theory of liability was that the airplane had "trespassed" on plaintiff's airspace by flying below a safe altitude. In *Adams v. Tennessee Valley Authority*,⁷⁶ the court first held that the liability of the T.V.A. should be determined by applying the standards of the Federal Tort Claims Act.⁷⁷ The court then applied the principles of the F.T.C.A., and held the T.V.A. liable for damage caused by nonnegligent blasting, because the damage was a "trespass on plaintiff's property" and thus, constituted a "wrongful act" within the meaning of the Tort Claims Act. The federal courts should not be forced to stretch their reasoning to the breaking point in order to render justice. In both of these cases the critical "wrongful act" was the act of engaging in a very dangerous activity and not the incidental trespass. Would Mr. Gaidys' neighbor be denied recovery because the plane did not "trespass" through his air space? The only accepted justification for holding a defendant liable for a nonnegligent and unintentional trespass is that he was engaged in an abnormally dangerous activity.⁷⁸ On the authority of *United States v. Causby*,⁷⁹ the Supreme Court in *Nelms* rejected any arguments that liability for sonic boom damage can be based on the theory of a trespass.⁸⁰ The old rule of strict liability

⁷⁵ 194 F.2d 762 (10 Cir. 1952).

⁷⁶ 254 F. Supp. 78 (E.D. Tenn. 1965).

⁷⁷ In *Brewer v. Sheco Construction Company*, 327 F. Supp. 1017, 1019 (WD Ky. 1971), the court rejects the statement in *Adams* that the tort liability of the T.V.A. is determined by the standard of the Tort Claims Act. The court held that the T.V.A. is subject to all common law liabilities including strict liability.

⁷⁸ See *PROSSER*, *supra* note 6, at 63-65. See also *RESTATEMENT (SECOND) OF TORTS* § 166 (1965), "Except where the actor is engaged in an abnormally dangerous activity, an unintentional and non-negligent entry on land in the possession of another or causing a thing or third person to enter the land, does not subject the actor to liability to the possessor, even though the entry caused harm to the possessor or to a thing or third person in whose security the possessor has a legally protected interest."

⁷⁹ 328 U.S. 256 (1946).

⁸⁰ 406 U.S. 797, 800 (1972).

ABSOLUTE LIABILITY

for any damage caused by a trespass has been repudiated in almost all the states.⁸¹

3. *Nondelegable Duty*—In the area of respondeat superior the judicially imposed prohibition of absolute liability against the United States, has actually caused the courts to unnecessarily deny liability. It is an accepted rule of agency that one who employs an independent contractor to engage in certain dangerous activities has a “nondelegable duty” to ensure that the independent contractor does not perform his work in a negligent manner.⁸² In many cases the employer is not held to a standard of absolute liability; rather he is only liable for his negligent failure to properly supervise the independent contractor. Many other courts,⁸³ however, have denied liability for a nondelegable duty on the theory that the statute requires that the injury be “caused by the negligent or wrongful act or omission of any *employee of the government*.”⁸⁴ Most decisions fail to explore the possibility that this type of liability can be based on the failure of an “employee of the government” to properly control the activities of an independent contractor.⁸⁵ The courts find it very difficult to draw the fine distinctions between vicarious absolute liability, which they would reject on the authority of *Dalehite*, and the failure of the government to exercise proper supervision over the extrahazardous activities of an independent contractor.

In *Emelwon, Inc. v. United States*,⁸⁶ the Court of Appeals for the Fifth Circuit, held the United States liable for damage caused

⁸¹ PROSSER, *supra* note 6, at 64.

⁸² *Id.* at 470-74.

⁸³ *Wright v. United States*, 404 F.2d 244 (7th Cir. 1968); *United States v. Page*, 350 F.2d 28 (10th Cir. 1965) *cert. denied*, 382 U.S. 979 (1966); *Dushon v. United States*, 243 F.2d 451 (9th Cir. 1957), *cert. denied*, 355 U.S. 933 (1958); *Strangi v. United States*, 211 F.2d 305 (5th Cir. 1954); *United States v. Hull*, 195 F.2d 64 (1st Cir. 1952); *Hodge v. United States*, 310 F. Supp. 1090 (M.D. Ga. 1969); *Nyquist v. United States*, 226 F. Supp. 884 (D. Mont. 1964); *Mahoney v. United States*, 220 F. Supp. 823 (E.D. Tenn. 1963); *Benson v. United States*, 150 F. Supp. 610 (N.D. Cal. 1957); *Hopson v. United States*, 136 F. Supp. 804 (W.D. Ark. 1956).

⁸⁴ 28 U.S.C. § 1346(b) (1971) (emphasis added).

⁸⁵ Two cases that recognized the distinction were: *Strangi v. United States*, 211 F.2d 305, 308 (5th Cir. 1954) (Fire damage caused by independent contractor in attempting to clear land for a dam and reservoir. The lower court found no breach of duty to supervise the contractors.); *Benson v. United States*, 150 F. Supp. 610, 612 (N.D. Cal. 1957) (Government would be liable if it negligently exercised its retained control to supervise construction of walkways).

⁸⁶ 391 F.2d 9 (5th Cir.), *cert. denied*, 393 U.S. 841 (1968).

60 MILITARY LAW REVIEW

by an independent contractor's negligent spraying of crops. The court said that it was not basing its holding on liability without fault nor on imputed negligence, but rather on the failure to discharge the legal duty, imposed by Florida law, of using "reasonable care in preventing or correcting an unsafe condition."⁸⁷

Certainly, when a state's nondelegable duty rule is not one of absolute liability, the courts need not hesitate to hold the government liable. The adoption of absolute liability under the Tort Claims Act would eliminate another instance where a difference in the *theory* of liability affects the outcome of a case.

4. *Other Theories*—Several other theories have been used to circumvent the law against absolute liability. In *Grant v. United States*,⁸⁸ the court, while refusing to impose absolute liability for sonic boom damage, awarded just compensation to the plaintiffs on the theory that the damage resulted from a temporary taking of plaintiff's property for the public use. *Barroll v. United States*⁸⁹ stated that although the Tort Claims Act did not permit absolute liability, the government should be held to a high standard of care when engaging in ultrahazardous activities and that in a proper case the plaintiff's proof may be sufficient to require the government to prove that it exercised the proper degree of care.⁹⁰ The case involved damage caused by the firing of an experimental cannon. The court found that the government had exercised the required degree of care.⁹¹

The theory of nuisance was discussed in *Denny v. United States*,⁹² a case decided before *Dalehite*. The court while holding that dudshells left on an isolated United States artillery range did not constitute a nuisance *per se* or a nuisance in fact, implied that had a nuisance been found the government would

⁸⁷ *Id.* at 11. *Accord*, *Pierce v. United States*, 142 F. Supp. 721, 734 (E.D. Tenn. 1955), *aff'd*, 235 F.2d 466 (6th Cir. 1956), (failure to take adequate precautions to avoid injury to an electrical lineman working for an independent contractor).

⁸⁸ 325 F. Supp. 843, 847 (W.D. Okla. 1970). Prior courts have not been so generous. In *Bartholomae Corp. v. United States*, 253 F.2d 716, 718 (9th Cir. 1957), the court denied liability for damage caused by nuclear detonations by refusing to find a fifth amendment taking or to impose absolute liability.

⁸⁹ 135 F. Supp. 441 (D. Md. 1955).

⁹⁰ *Id.* at 448. The court felt that this reasoning reconciled the holdings, if not the language of *Praylou* and *Dalehite*.

⁹¹ *Id.* at 448-49.

⁹² 185 F.2d 108 (10th Cir. 1950).

ABSOLUTE LIABILITY

have been absolutely liable for all damage caused by the nuisance.²³

The courts have frequently held the government liable for the violation of state safety laws that demand a very high degree of care. The United States has argued that these statutes in effect impose absolute liability. The decisions, of course, turn on the wording and prior judicial construction of the statute. The courts tend to find negligence *per se* for violation of the statute and are reluctant to declare that a statute imposes absolute liability.²⁴

Many courts seem to be grasping for theories by which they can circumvent the judicially imposed rule of no absolute liability. In view of the many torts that could be characterized as based on absolute liability²⁵ and therefore not within the *Dalehite and Nelms* meaning of the term "wrongful", the courts should be relieved of the burden of seeking artificial distinctions in order to render justice. The Congress should clarify the statute, in order to make the liability of the United States truly identical with that of a private person.

V. ABSOLUTE LIABILITY OUTSIDE OF THE FEDERAL TORTS CLAIMS ACT

In the field of atomic energy Congress has consented to the imposition of absolute liability. Under the Price-Anderson Act, the Atomic Energy Commission may pay damage claims up to

²³ *Id.* at 110-11. A nuisance can be created by either intentional or negligent conduct. See PROSSER, *supra* note 6 at 573-77. If the creation was intentional then it is very similar to participating in an extra hazardous activity.

²⁴ *Fentress v. United States*, 431 F.2d 824 (7th Cir. 1970) (violation of Illinois Scaffold Act); *Schmid v. United States*, 273 F.2d 172 (7th Cir. 1959) (violation of Illinois Scaffold Act); *American Exchange Bank v. United States*, 257 F.2d 938 (7th Cir. 1958) (violation of Wisconsin Safe Place Statute); *Stewart v. United States*, 186 F.2d 627 (7th Cir.), *cert. denied*, 341 U.S. 940 (1951). (violation of Illinois Statute on Storing Explosives). However, in *Konsler v. United States*, 288 F. Supp. 895 (N.D. Ill. 1968), the court found that the Illinois Dram Shop Act did impose absolute liability. The court in *Konsler* at 897, reaches the interesting conclusion that even if the plaintiff could prove negligence, the fact that the statute imposes liability without fault precludes any action against the United States.

²⁵ See Peck, *supra* note 6 at 443-44. Professor Peck mentions torts such as removal of lateral and subjacent support to land, harm caused by wild animals reduced to possession, conversion by a bona fide purchaser, mis-delivery, by a bailee, and the insurer's liability of innkeepers and common carrier's.

60 MILITARY LAW REVIEW

\$5,000 without any proof of negligence.⁹⁶ The A.E.C. may also contract to indemnify persons who sustain liability resulting from their participation in atomic energy programs. The indemnification takes the form of excess insurance up to \$500 million against public liability arising from nuclear accidents.⁹⁷ Although this Act was adopted to dispel the reluctance of companies to participate in atomic energy projects that might subject them to enormous liability claims, it is precedent for imposing absolute liability on the government. It has been recommended that an even better method of compensating victims of catastrophic accidents stemming from government programs, one that would avoid the problems caused by insolvent contractors, would be to give the victim a direct cause of action against the government based on absolute liability.⁹⁸ This would ensure that the injured persons always had a solvent defendant and would eliminate any problems of serving process or obtaining jurisdiction over the actual tort-feasor.

French and German laws have long accepted absolute tort liability against the government.⁹⁹ Experience in these countries suggests that the risk of this type of liability has not hampered the efficient exercise of government activities nor placed an undue financial burden on the national treasury.¹⁰⁰

Sovereign immunity is also finding increasing disfavor in the courts and legislatures of the states. At an ever increasing rate, state governments are waiving sovereign immunity or the courts are declaring the concept invalid.¹⁰¹

VI. CONCLUSION

Sovereign immunity is on the wane not only because it is horribly unjust, but also because it has proved to be unnecessary.

⁹⁶ 42 U.S.C. § 2207 (1970).

⁹⁷ 42 U.S.C. § 2210 (1970).

⁹⁸ A. ROSENTHAL, H. KORN, & S. LUBMAN, *CATASTROPHIC ACCIDENTS IN GOVERNMENT PROGRAMS*, 81-86 (1963). Reprinted in *Hearings Before a Subcommittee on Government Operations House of Representatives*, 91st Cong., 1st Sess. 2143 (1969).

⁹⁹ JACOBY, *supra* note 6, 26 FED. B.J. at 7-10. Jacoby notes that in France it is not even necessary to find an individual employer at fault, in order to hold the government liable. *Faute de service public* is sufficient for liability.

¹⁰⁰ See A. ROSENTHAL, *supra* note 98 at 84 note 213. This counters, to some extent, Professor Davis' arguments that extensive government tort liability would hamper Government operations. Davis, *Tort Liability of Governmental Units*, 40 MINN. L. REV. 751, 791-96 (1956).

¹⁰¹ See Greenhill & Murto, *Governmental Immunity*, 49 TEX. L. REV. 462 (1971); Van Alstyne, *Governmental Tort Liability: A Decade of Change*, 1966 U. ILL. L. FORUM 919 (1966).

ABSOLUTE LIABILITY

The Federal Tort Claims Act and its legislative history seemed to provide ample leeway for a construction that would permit the imposition of absolute liability against the United States. Nevertheless, the Supreme Court and the vast majority of federal courts refuse to impose absolute liability under the Tort Claims Act. Rather than accepting absolute liability, the courts attempt to circumvent the issue by dreaming up alternative theories of liability. These alternative theories result in an unequal and unpredictable application of the law.

One of the guiding principles of our legal system is that for every wrong there should be a remedy. Sovereign immunity is an affront to that principle and should be restricted to the greatest extent possible. The purpose of the Federal Tort Claims Act was to waive sovereign immunity and thereby relieve Congress of the wearisome burden of enacting private relief legislation. The statute specifically provides that, "[t]he United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances. . . ." ¹⁰² In view of the refusal of the federal courts to impose absolute liability, the Congress should amend the Tort Claims Act so as to clearly provide for absolute liability.

An amendment making absolute liability applicable to the United States would in the words of Professor Peck, "bring to an end the somewhat ludicrous situation in which the party to whom the rationale of absolute liability could most appropriately be applied is exempt from its application. Certainly if any defendant has the risk-bearing capacity and the ability to pass on and spread equally the expense of the accidents which inevitably result from its operations, that defendant is the United States Government." ¹⁰³ As the public as a whole benefits from the activities of the Government, it is unjust to cast the entire burden of a government accident on the injured party. ¹⁰⁴

The proper structure for a tort claims act is to impose complete tort liability upon the government and then carve out these areas for which liability is considered inappropriate. This can be

¹⁰² 28 U.S.C. § 2674 (1970).

¹⁰³ Peck, *supra* note 6, at 454.

¹⁰⁴ In *Rayonier, Inc. v. United States*, 352 U.S. 315, 320 (1957), Justice Black stated:

Congress was aware that when losses caused by such negligence are charged against the public treasury they are in effect spread among all those who contribute financially to the support of the Government and the resulting burden on each taxpayer is relatively slight. But when the entire burden falls on the injured party it may leave him destitute or grievously harmed. Congress could, and apparently did, decide that this would be unfair when the public as a whole benefits from the services performed by Government employees.

60 MILITARY LAW REVIEW

done through the use of specific exceptions from liability. With the exception of the judicially created exemption from absolute liability, this is the structure of the present Federal Tort Claims Act. After imposing liability for all "negligent or wrongful acts or omissions." ¹⁰⁵ of the United States, a later section lists fourteen exceptions from liability.¹⁰⁶ Thus, all that need to be done to amend the Act would be to change Section 1346(b) to read "caused by the tortious act or omission of any employee of the government." ¹⁰⁷

The word "tortious" is, of course, much broader than "negligent" and need not have the moral connotation of the word "wrongful." A "tortious act" would be any act that under the applicable law would subject the actor to tort liability.¹⁰⁸ Thus, the United States would truly be "liable . . . in the same manner and to the same extent as a private individual under like circumstances."

The change of two words is all that is required to provide equal protection for many victims of government torts. While most activities for which absolute liability might be deemed inappropriate would be barred by the discretionary function exception, any additional activities could simply be added to the list of exceptions.

¹⁰⁵ 28 U.S.C. § 1346(b) (1970).

¹⁰⁶ 28 U.S.C. § 2680 (1970).

¹⁰⁷ See *supra* note 2, for the present wording of the statute.

¹⁰⁸ See the quote from *Praylou, supra*, note 22. *Nelson v. Millar*, 11 Ill. 2d 378, 143 N.E. 2d 673, 680 (1957). "The word 'tortious' can be used to describe conduct that subjects the actor to tort liability."

SURVEILLANCE FROM THE SEAS*

By Lieutenant Commander Robert E. Coyle**

I. INTRODUCTION

In August, 1964, two US destroyers, the USS Maddox and the USS Turner Joy while in the Gulf of Tonkin gathering electronic information on coastal radar installations, were allegedly attacked on the high seas by North Vietnamese torpedo boats.¹ These ships and this incident were the basis for the Gulf of Tonkin Resolution of the United States Senate which allowed a widening of the United States involvement in Vietnam.² In June, 1967, the USS Liberty, a specially outfitted and designated electronics surveillance ship of the United States Navy, was attacked and severely damaged while sitting some thirteen miles off the coast of Egypt listening to battlefield communications between the combatants in the Arab-Israeli war.³ Even more sensational was the seizure of the USS Pueblo,⁴ a ship similar to the Liberty and having the same function. In January 1968, while conducting an eavesdropping mission off the coast of North Korea and while in international waters (although this point is debatable),⁵ she was seized and her crew imprisoned by the North Koreans.

This list of incidents involving surveillance forces is by no means inclusive. There has, in addition to use of sea-going vessels, been surveillance by airplanes and satellites.⁶

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¹ A. TULLY, *THE SUPER SPIES*, 133-35 (1969); *New York Times*, August 7, 1964, at 1.

² Act of August 10, 1964, Pub. L. No. 88-408, 59 Stat. 1031.

³ TULLY, *supra* note 1 at 131-33; *New York Times*, June 9, 1967, at 1.

⁴ *New York Times*, January 24, 1968, at 1.

⁵ *Id. See also* Aldrich, *Questions of International Law Raised by the Seizure of the USS Pueblo*, 1969 *PROCEEDINGS AM. SC. OF INT. LAW* 3.

⁶ Wright, *Legal Aspects of the U-2 Incident*, 54 *AM. J. INT. LAW* 836

60 MILITARY LAW REVIEW

General Wheeler, a former Chairman of the Joint Chiefs of Staff, in 1969 disclosed that "since 1949 US reconnaissance ships and planes have been the targets of 41 attacks by the North Koreans" alone.⁷

The justification which the United States puts forth for its surveillance activities is best summarized by former Secretary of State Herter's response to Soviet objections to the U-2 incident of 1960:

... [I]t is unacceptable that the Soviet political system should be given the opportunity to make secret preparations to face the free world with the choice of abject surrender or nuclear destruction. The government of the United States would be derelict to its responsibility not only to the American people but the free people everywhere if it did not, in the absence of Soviet cooperation, take such measures as are possible unilaterally to lessen and to overcome this danger of surprise attack. In fact, the United States has not and does not shirk this responsibility. . . .⁸

II. THE PROBLEM

This comment will examine surveillance activities with a view toward defining what is or should be permissible under international law.⁹ The comment will examine surveillance activities within the context of the existing legal organization of the oceans and in light of the United Nations' norms of territorial integrity, political independence, nonintervention, sovereign equality, and self-defense. The specific questions for which answers will be sought are: (1) Are surveillance activities illegal *per se* (2) If not, should they be? (3) If surveillance may be permitted what are the limits of such permission? The factual context will be limited to activities conducted by military naval vessels operating on the surface of the oceans.

What significant factors do the previously mentioned activities share? First they share a commonality of purpose. All of these missions, regardless of the method employed, are designed to gather data (electronic, hydrographic, visual, etc.) which

(1960); Dean, *The Second Geneva Convention Conference on the Law of the Sea: The Fight for Freedom of the Sea*, 54 AM. J. INT'L. LAW 789, n.165 (1960); US NEWS AND WORLD REPORT, April 28, 1969, at 25-27; D. WISE & T. ROSS, *THE INVISIBLE GOVERNMENT* (1964); Washington Post, February 8, 1972, at A1; US NEWS AND WORLD REPORT, September 9, 1968, at 69, and November 24, 1969, at 32-33; cf. Wall Street Journal, April 18, 1969.

⁷ TIME, May 16, 1969, at 23.

⁸ Wright, *supra* note 6, at 847-48.

⁹ For the purpose of this comment surveillance will be considered to encompass only the passive type and does not include probing a nation's defenses by electronic means.

SURVEILLANCE

may help the observing nation determine the target state's intentions, war-making capabilities, and defenses (natural or artificial) and what strategy and tactics would be most effective in the event of an armed conflict between the nations. Of course this information may be gathered for either an aggressive (green light)¹⁰ purpose, i.e., illegal invasion, or a defensive one (red light),¹¹ i.e., warning of surprise attack. A second common factor is that the observing force is usually clearly identifiable as an intelligence gatherer and usually is a military unit displaying her country's colors. Finally, the missions are acknowledged to be the official acts of the sending government. While it is true that there is no announcement in advance of each mission, the activity is publicly acknowledged and specific missions are defended if an objection is made by a state.

Why do target states respond so forcefully? The observed states have not demonstrated initiative nor been convincing in defining the vital legal interests they so obviously feel are seriously threatened by these intelligence gathering activities. Both the Soviet Union and North Korea point to a violation of their territorial integrity—even where there was clearly no physical entry into either the territory or airspace of the country.¹² It is possible that these seemingly baseless assertions may be nothing more than an attempt to create an "acceptable" legal facade for their actions.

The Soviet Union has also alleged very forcefully that reconnaissance activities constitute an act of aggression.¹³ In the U-2 matter the Soviet Union specifically requested that the Security Council declare the flight to be such an act. However, the Security Council decided by a 7-2 vote (with abstentions) that "the U-2 flight was not an act of aggression,"¹⁴ although it involved a physical entry into the airspace of the Soviet Union. More recently the Soviet Union has not continued to press the point that these activities constitute acts of aggression.¹⁵ Perhaps this indicates that the Soviets have changed their attitude, realizing the value of reconnaissance activities.

¹⁰ ESSAYS ON ESPIONAGE AND INTERNATIONAL LAW, 42 (R. Stanger ed. 1962).

¹¹ *Id.*

¹² See New York Times, July 17, 1960, § 4 at E5; Aldrich, *supra* note 5 at 2-4.

¹³ M. McDUGAL, H. LASSWELL & I. VLASIC, LAW AND PUBLIC ORDER OF SPACE, 236, 314 (1963).

¹⁴ Wright, *supra* note 6, at 846-47.

¹⁵ Butler, *The Pueblo Crisis: Some Critical Reflections*, 63 J. AM. SOC. INT. LAW 7-8 (1969).

It is appropriate to examine for a moment the sources from which the data is collected. The primary source is electronic emissions from the target state. Basically the observed state operates electronic equipment as part of its defensive network. The purpose of the equipment may be to provide communication between elements of the government or to search for the presence of hostile forces. Normal operation of this equipment emits electro-magnetic radiation generally into space.¹⁶ Therefore it is normal for the signal to be "receiveable" by more than just the intended target. The area of reception is influenced by the type of antennae, by the wavelength of the radiation and by the atmospheric conditions existing at the time of transmission and reception.¹⁷ The information thus obtained can be used for a number of purposes.¹⁸ It enables the collecting state to break the target state's codes and hence to "read" encoded transmission; to determine the capabilities of the defensive equipment so that in the event of hostilities between the two states, attacking forces could circumvent such defenses; to determine the political and military posture of the target state; and to determine a successful invasion plan.

It is clear that the states of the world are aware that the signals from this equipment reach beyond the intended receiver and even beyond the boundaries of their respective states. The best evidence of this knowledge is the wide-spread use of codes and "scramblers" to camouflage the meaning or source of the transmission.¹⁹ It is impossible to believe therefore that the states *expect* these transmissions to remain "private."

Surveillance forces also visually observe the coastline noting particularly the locations of military installations and natural defenses or weaknesses. Further, hydrographic information is collected to facilitate possible submarine, mine laying or amphibious operations. It is clear that these reconnaissance activities penetrate to the very heart of the defenses of a state and its national security. Thereby the target state is vulnerable²⁰ in any adversary situation with the gathering state.

¹⁶ B. GRIFFITH, *RADIO-ELECTRONIC TRANSMISSION FUNDAMENTALS*, 398 (1962); F. TERMAN, *ELECTRONIC AND RADIO ENGINEERING*, 870-72 (1955).

¹⁷ GRIFFITH, *supra* note 16 at 315-26; TERMAN, *supra* note 16 at 803.

¹⁸ ESSAYS ON ESPIONAGE, *supra* note 10 at 7.

¹⁹ See J. THOMPSON & S. PADOVER, *SECRET DIPLOMACY*, 13-30 (1963).

²⁰ Butler, *supra* note 15 at 10-11.

SURVEILLANCE

III. THE LEGAL SETTING

A. CLASSIFICATION OF WATERS

International law recognizes four primary divisions of the waters of the globe which are entitled internal waters,²¹ territorial seas,²² the contiguous zone²³ and the high seas.²⁴ As we shall see in more detail these divisions of the waters of the world reflect the belief that man is incapable of physically occupying areas of the oceans and reducing them to possession as he is able to do with his land territories.

It is clear that a state is able to exercise a high degree of control over the waters immediately off its shores.²⁵ Further, it is reasonable to say that such a state is, in fact, capable of occupying those waters for some limited distance. However, as one moves seaward from the coastline, the state's ability to possess and control the waters diminishes until we reach a point where all effective power has ceased.

We may look at what interests a state has in the waters off its shores. A state is most vitally concerned with those events which do or may affect its territorial or political integrity.²⁶ The probability of an event actually affecting a state varies in inverse proportion to the distance at which the act occurs from the territory of the state: the greater the distance at which an act occurs from a state the less significant its impact on the state.

Finally it must be noted that the states of the world have a significant interest in voyaging over the oceans and in trading and communicating with one another. The farther we get from the shore the more the balance should swing in favor of unfettered use of the oceans by all states.

In view of the foregoing it is not surprising to learn that men have long argued over the question of who has the right to exercise control over the oceans.²⁷

A little more than five centuries ago, it was generally contended that the sea could be appropriated, that it was not free to the navigation and use of all mankind. Large tracts of it were subjected to

²¹ Convention on the Territorial Sea and the Contiguous Zone, TIAS 5639, Art. 5, para. 1.

²² *Id.*, Arts 3-13.

²³ *Id.*, Art. 24.

²⁴ Convention on the High Seas, TIAS 5200, Art. 1.

²⁵ M. McDougal & W. Burke, *THE PUBLIC ORDER OF THE OCEANS*, 1-87 (1962).

²⁶ *Id.*

²⁷ C. COLOMBOS, *INTERNATIONAL LAW OF THE SEA*, 48 (6th rev. ed. 1967); L. OPPENHEIM, *INTERNATIONAL LAW*, 582-87 (Lauterpacht 8th ed. 1960).

60 MILITARY LAW REVIEW

partial appropriation, while over other portions of the open sea vague and exaggerated claims were made. Gradually the larger claims were abandoned, those who made them found themselves hampered in other directions, and the increase of sea-borne communications and the growth of maritime commerce proved too strong for the States which had endeavoured to retain great areas of the ocean for their own flags. The high sea does not form part of the territory of any State. No State can have over it a right to ownership, sovereignty or jurisdiction. None can lawfully claim to dictate laws for the high seas.³⁰

Freedom of the seas then

... had its basis in a common recognition of the desirability of preventing one state, or a group of states, from asserting a legal right to bar other members of the community of nations from the use of any portion of the high seas.³¹

Note that the two authors put forth a different "key" or "basis" for the doctrine. Colombos finds the "key" to be the inability of any state to effectively occupy the area of the ocean claimed.³⁰ On the other hand, von Glahn finds the basis to rest in an international consensus that the oceans should be open to all because no one nation could assert a legal bar to another nation's use.³¹ Oppenheim cites both facts as the reason for the concept.³² The distinction is important when trying to properly apply the concept in new setting as technology shrinks time and distance.

Regardless of how one views the development of the concept, it is clear that presently no state may prohibit another state from any reasonable use of the high seas.³³ All states have a right to use the high seas yet each state's use must not unreasonably interfere with the mutual right held by another state.³⁴ For our present purposes the most significant element of the concept of free use of the high seas is the complete immunity from the jurisdiction

³⁰ COLOMBOS, *supra* note 27 at 61-62; *see also* 4, M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 501-23 (1965), for an excellent summary of the historical development of the concept of freedom of the seas including excerpts from and references to the major writers in the area. Lastly, *see* Schwarzenberger, *The Fundamental Principles of International Law*, 87 RECUEIL DES COURS 195, 358-83 (1952).

³¹ G. VON GLAHN, LAW AMONG NATIONS, 323-24 (1970). *See also* Holmes, *Freedom of the Seas*, 22 NAVAL WAR COLLEGE REVIEW 4. (June 1970).

³² *See also* J. WESTLAKE, INTERNATIONAL LAW, 164-67 (2d ed. 1910).

³³ *See note 29 supra.*

³⁴ OPPENHEIM, *supra* note 27 at 593.

³⁵ Convention on the High Seas, TIAS 5200, Art. 2; *Church v. Hubbard*, 6 U.S. (2 Cranch) 187 (1803).

³⁶ McDUGAL & BURKE, *supra* note 25 at 743-47.

SURVEILLANCE

of other states that a man-of-war enjoys while she is on the high seas.³⁵

B. INNOCENT PASSAGE

Ships may pass through the territorial waters of a nation under a right of innocent passage.³⁶ The territorial waters consist of that portion of the sea extending outward from the baseline of the coast for a declared distance.³⁷ The ship in passage does not enjoy absolute immunity from the coastal state's jurisdiction but, at best, a qualified immunity.³⁸ The coastal state may not levy any charge for the transit but the transiting vessel must comply with the laws and regulations of the coastal state relating to safety and navigation.³⁹ The coastal state may exercise criminal or civil jurisdiction over the ship and its crew for acts which are committed during the passage which "extend to the coastal state" or "disturb the peace of the country or the good order of the territorial sea."⁴⁰ The origin of the concept is in the accommodation of the completing interest of the coastal states on the one hand and the world community on the other.⁴¹ The latter are interested in keeping the oceans open to all for the purpose of trade and communications while the former are interested in maintaining secure boundaries and internal security.

The 1958 Geneva Convention on the Territorial Sea defines "innocent" passage as all passage which "is not prejudicial to the peace, good order or security of the coastal state."⁴² It is important to note that during the discussions which resulted in the final draft of the Convention, the International Law Commission proposed to define "innocent" passage as follows: "passage is innocent so long as a ship does not use the territorial sea for committing any acts prejudicial to the security of the coastal state."⁴³ The language was not adopted. Rather the language

³⁵ COLOMBOS, *supra* note 27 at 259-60 [hereafter cited as COLOMBOS]; Convention on the High Seas, TIAS 5200, Art. 8, § 1.

³⁶ COLOMBOS at 132-33.

³⁷ COLOMBOS at 87-88; The Convention on the Territorial Sea and the Contiguous Zone, TIAS 5639, § II.

³⁸ P. JESSUP, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION, 122-23 (1927).

³⁹ COLOMBOS at 133; The Convention on the Territorial Sea and the Contiguous Zone, TIAS 5639, Art. 18, para. 1.

⁴⁰ The Convention on the Territorial Sea and the Contiguous Zone, TIAS 5639, Arts. 19 and 20; JESSUP, *supra* note 38 at 123-44.

⁴¹ COLOMBOS at 132; JESSUP, *supra* note 38 at 120.

⁴² Convention on the Territorial Sea and the Contiguous Zone, TIAS 5639, Art. 14, para. 4.

⁴³ Report of the International Law Commission Covering the Work of its 324th Meeting, A/CN.4/SR324.

agreed to was adopted with the hope that the emphasis would be placed on passage rather than on acts committed during passage and hence broaden the rights which a coastal state would have over ships transiting her territorial sea.⁴⁴

Before further discussing the right of innocent passage, it is important to note that the existence and extent of the right may depend on the classification of the vessel, *i.e.*, merchantman or man-of-war. We must, therefore, know the classification of surveillance ships.

... (T)here is no multilateral convention that directly defines 'warship.' Hague Convention VII (1907), by enumerating the conditions that must be satisfied in order to convert a merchant vessel into a warship indirectly defined the latter. In this Convention a vessel in order to qualify as a warship must be placed under the direct authority, immediate control, and the responsibility of the power whose flag it flies; it must bear the external marks distinguishing the warships of the state under whose authority it acts; the commander of the vessel must be in the service of the state, duly commissioned and listed among the officers of the fighting fleet; the crew must be subject to naval discipline; and the vessel must observe in its operation the laws and customs of war. In principle, these criteria may still be regarded as furnishing the distinctive features of warships.⁴⁵

As useful as this definition is, it was created as part of an attempt to control the waging of war and this fact may make its application to our peacetime setting miss the mark. The other aspect of the classification stresses the result of the classification; characterization as an "organ of the State which maintains them" or as "floating portions of the flag-State."⁴⁶ It is this aspect of the classification that is most important in our context. Surveillance ships should be classified as "warships" because they are foremost an organ of the state which maintains them. The characterization of these surveillance ships as men-of-war cuts both to their advantage in that as such they enjoy a greater freedom from the jurisdiction of the target state and to their disadvantage in that their freedom of action is limited—particularly as we shall see in the territorial seas. Now let us turn our attention to the right of innocent passage for warships.

One view holds that the right of innocent passage does not extend to warships at all.⁴⁷ "Warships may not pass without

⁴⁴ Hearn, *The Law of the Sea: The 1958 Geneva Conference*, JAG JOURN. 5 (Mar.-Apr. 1960).

⁴⁵ R. TUCKER, THE LAW OF WAR AND NEUTRALITY AT SEA, 38-39.

⁴⁶ OPPENHEIM, *supra* note 27 at 853.

⁴⁷ JESSUP, *supra* note 38 at 120.

SURVEILLANCE

consent into this zone [the territorial sea], because they threaten. Merchant ships may pass and repass because they do not threaten."⁴⁸ The right of innocent passage grew up because states recognized their mutual interests in the use and free access to all parts of the oceans for purposes of trade and communications. Warfare was a different matter.

Here there is no general interest necessarily or commonly involved Such a privilege is to the advantage only of the individual state and may often be injurious to the third state. It may sometimes be dangerous to the proprietor of the water's used. A state has therefore always the right of refusing access to its territorial waters to armed vessels of another state if it wishes to do so.⁴⁹

While that viewpoint has wide acceptance it does not occupy an unchallenged position.⁵⁰ However, even in those cases where the right of innocent passage is found to vest in warships it is not held to be co-extensive with the right as applied to merchantmen. The first significant distinction is that the right applies to warships only during times of normal international intercourse between the involved states.⁵¹ Further a number of writers, who hold that warships do enjoy the right of innocent passage, allow such a right solely in waters which constitute the only practical or possible course between two locations on the oceans, *i.e.*, the international straits such as the Bosphorus or Dardanelles.⁵²

Perhaps the most instructive incident for understanding the contemporary interpretation of the right of innocent passage—particularly as applicable to men-of-war—is the Corfu Channel Case⁵³ decided by the International Court of Justice in 1949. In that case, in May of 1946, two British men-of-war were proceeding through the Corfu Channel which lay in the territorial waters of both Albania and Greece. During the passage the Albanian shore batteries fired on the British ships.⁵⁴ The Albanians, in responding to the resulting British protest, asserted the view that, due to the political turmoil in the area, all foreign ships, merchantmen and warships alike, had no right to pass

⁴⁸ *Id.*

⁴⁹ *Id.* at 120-21.

⁵⁰ COLOMBOS at 133.

⁵¹ *Id.* See also Corfu Channel Case [1949] I.C.J. 74 (dissenting opinion of Justice Krylov).

⁵² COLOMBOS at 260.

⁵³ Corfu Channel Case [1949] I.C.J.

⁵⁴ *Id.* at 27.

60 MILITARY LAW REVIEW

without giving prior notice to Albania and obtaining her permission.⁵⁵ The British insisted on the right of free passage.

Subsequently in October, 1946, four British warships proceeded through the same channel for the purposes of passing to the Adriatic Sea to rendezvous with other ships already there and to press their claim of the right of innocent passage. During the passage the coastal defenses were closely observed and reported by at least one ship, HMS VOLAGE.⁵⁶ During the passage two warships struck mines and the ensuing claim for damages was referred to the International Court of Justice for settlement.

The Albanians contended that because of the earlier incident this passage was not an ordinary passage but rather a political mission, to assert Britain's right of innocent passage through these waters; that the general display of force showed an intention to intimidate and not merely to pass; and that the British ships had received orders to observe and report on the coastal defenses.⁵⁷

The court seemed to hold that the innocence of a passage depends primarily on the manner of the passage rather than on its motive. To be innocent the passage need not be purely navigational, *i.e.*, merely passing from one geographical point to another. It can have a political object if that object is justified—here the assertion of the right of innocent passage. If the right exists, there is no need not to exercise it merely because it is contested. Further, if the passage is innocent it does not cease to be innocent because it constitutes or is accompanied by a demonstration of strength and still less if it is done in such a way as to protect the ships from any hostile attacks. However, if the motive is political, the operational aspect of the transit must be to pass.⁵⁸

The court specifically was of the opinion that

States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that this passage is *innocent*. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace.⁵⁹

The question put before the court, which included the issue of the right of innocent passage, was: did the British violate the

⁵⁵ *Id.*

⁵⁶ *Id.* at 31-32.

⁵⁷ *Id.* at 30.

⁵⁸ Fitzmaurice, *The Law and Procedures of the International Court of Justice: General Principles and Substantive Law*, 28 BRIT. YEARBOOK OF INT. LAW 28-29.

⁵⁹ *Corfu Channel Case [1949] I.C.J. 28.*

SURVEILLANCE

sovereignty of Albania? That issue was answered in the negative by a vote of 14-2 by the court.⁶⁰

It is unfortunate that the single most important element of this case as it relates to our topic was not answered directly even though the opportunity clearly presented itself.⁶¹ The court refused to discuss the reconnaissance aspect of the passage because of the absence of any showing that the activity was part of the officially directed operation. The observation of the coastal defenses was dismissed as a legitimate exercise of the right of self-defense after two of the British ships had suffered damage.⁶² However, Fitzmaurice, in commenting on the case was of the opinion that

if the motive (or the passage) were espionage, *e.g.*, the observation of the coastal defenses, the passage would not rank as innocent. But a merely *incidental* observation of coastal defenses could not suffice to render non-innocent a passage not undertaking for that purpose.⁶³

The 1958 Geneva Convention on the Territorial Sea was envisioned as a codification of the existing international law on the subject⁶⁴ even though the preamble to the final draft did not contain a statement to that effect as did the Convention on the High Seas.⁶⁵ The final text of the latter Convention holds "the right of innocent passage to apply to all ships."⁶⁶ The International Law Commission in its 1954 report commented:

the right of passage does not imply that warships are entitled without special authorization to stop or anchor in the territorial seas. The Commission did not consider it necessary to insert an express stipulation to this effect.⁶⁷

It was noted that as a general practice the states of the world give advance notice of the passing of their warships through the territorial waters of another state and arrange specific prior approval for port visits of such ships.⁶⁸ The US position is in accord with the Convention and Corfu Channel Case positions but the "Soviet Union does not recognize that warships are entitled

⁶⁰ *Id.* at 36.

⁶¹ *Id.* at 30.

⁶² *Id.* at 32.

⁶³ Fitzmaurice, *supra* note 58 at 29, note 1.

⁶⁴ A/Cn.4/SR.306 at 16.

⁶⁵ Convention on the Territorial Sea and the Contiguous Zone, TIAS 5639, § III, subsec. A.

⁶⁶ Convention on the High Seas, TIAS 5200.

⁶⁷ See in particular the 306th, 307th, and 308th Meetings of the International Law Commission at A/Cn.4/SR. 306, 307, and 308.

⁶⁸ A/CN.4/SR. 306, at 16.

60 MILITARY LAW REVIEW

to enjoy the right." Still the Soviet's position is not altogether clear.⁶⁹

A review of the foregoing comments regarding "innocent passage" shows the depth of the issues involved when attempting to pin down the proper limits of security interest as a basis for reducing the freedom of action of the ships of other nations. However, for our particular problem a number of significant points stand out. First, the right, when it exists, exists only in time of peace. Second, a warship by its very nature is subject to much closer scrutiny as compared with a merchantman when trying to determine the impact of such a ship's presence or activities on a coastal state's security or the good order of its territorial sea. It is fair to say that a presumption exists that a warship *ipso facto* threatens the security of any state it approaches. Therefore a coastal state may prohibit the entry of a warship into its territorial waters unless a good reason exists. The Corfu Channel Case stands for the proposition that use of an international waterway which lies in a territorial sea is a good reason.

Where the right to innocent passage is found to vest in warships, the passage must still meet the test of "innocence." It would seem that during a permitted passage acts such as visual or electronic sightings of aids to navigation located on or physical landmarks of the territory of the coastal state would not be impermissible when such information is used to navigate the ship.⁷⁰ Likewise obtaining depth readings to cross-check other navigational methods would be permitted. However an unnecessarily slow transit of the territorial sea to afford a greater time to collect data or an unreasonable frequency of transits by such ships would take such passages outside the ambit of "innocence."⁷¹ In other words, any act reasonably necessary to allow the warship to make a safe transit of the water is permissible even if such information may be used for other reasons. Any act not calculated to effect a safe and prompt passage and which may effect the safety of the coastal state or the good order of its territorial sea may be impermissible.⁷²

⁶⁹ Goldie, *International Law of the Sea: A Review of States' Offshore Claims and Competency*, 24 NAVAL WAR COLLEGE REVIEW 43, 45 (1972).

⁷⁰ Fitzmaurice, *supra* note 58 at 29, note 1; see also Butler, *supra* note 15 at 8.

⁷¹ The precise answer to the issue of whether surveillance acts not connected with transit are permissible is reserved for discussion at a later point.

⁷² Corfu Channel Case [1949] I.C.J.

SURVEILLANCE

IV. SURVEILLANCE ANALYZED

Now that the setting is in hand let us begin our search for the rules of surveillance with the basic question: Are or should such activities be illegal *per se*? In considering this question, we should remember that one of the basic principles of international law holds that a complaining state must bear the burden of showing that the conduct complained of violated an existing rule of international law.⁷³

International law does not precisely cover the topic of nautical surveillance. The only generally related recognized topic is the law of spies which allows belligerents to employ spies for obtaining information from the enemy.⁷⁴ Authoritative international law defines spies as:

secret agents of a State sent abroad for the purpose of obtaining, clandestinely, information in regard to military or political secrets. Although all States constantly or occasionally send spies abroad, and although it is not considered wrong morally, politically, or legally to do so, such agents have, of course, no recognized position whatever according to International Law, since they are not official agents of States for the purpose of international relations . . .⁷⁵

A person can only be considered a spy when, acting clandestinely or on false pretenses, he obtains or endeavors to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.⁷⁶

Resort to that practice [employing spies] involves no offense against international law. Spies are punished, not as violators of the laws of war, but to render that method of obtaining information as dangerous, difficult, and ineffective as possible.⁷⁷

From the foregoing we see that the essence of spying is the clandestine or secretive nature of the work and the fact that no official recognition is given to the activities. Further the statements seem to imply that the activity must take place during wartime within the territory of the target state.

Professor Wright makes the interesting observation that the reason espionage is legitimate (at least not illegal) is that during wartime there is no "general obligation of the belligerents to respect the territory or government of the enemy."⁷⁸ The obvious implication for peacetime regimes is that espionage without a violation of the state's territorial integrity is no crime against

⁷³ Case of the S.S. "Lotus" [1927] P.C.I.J., ser. A, No. 10.

⁷⁴ ESSAYS ON ESPIONAGE, *supra* note 10 at v-vii.

⁷⁵ OPPENHEIM, *supra* note 27 at 862.

⁷⁶ Hague Convention No. IV of 1907, Art. 29, 36 Stat. 2277.

⁷⁷ US DEPT OF ARMY, FM 27-10, LAW OF LAND WARFARE, Art. 77.

⁷⁸ ESSAYS ON ESPIONAGE, *supra* note 10 at 12.

60 MILITARY LAW REVIEW

international law. In fact Professor Wright goes on to say that it is for each state to define espionage in peacetime.⁷⁹ He argues that in peacetime any penetration of the territory of a state by agents of another state in violation of the local law is a violation of the rule of international law which imposes a duty on all states to respect the territorial integrity and political independence of other states.⁸⁰ At the least, surveillance is not "spying" in the traditional sense. Here governmental agents are acting on publicly acknowledged missions, in readily identifiable vessels, in peacetime (at least nominally), and outside the territory of the target state. Should these activities share the opprobrium of traditional spying? The suggested answer to the question is "no" for the reasons that these activities neither violate the territory of the target state nor constitute impermissible intervention in the political independence of the target state.

We have noted earlier that the very nature of the electronic equipment makes the signals generated subject to being received by a wider circle than merely the intended receiver. Further the genesis of the signals is an act of the target state not of the collecting state. Therefore it is clear that the reception of these emissions does not require the positioning of an agent within the boundaries of the target state. For that reason and to that extent it is impossible to construe such activities as a violation of the territory of the target state.

However, reconnaissance missions in accomplishing their task may use means which violate international law. For example a mission may make a simulated attack on the target state, to assist in collecting data. Such attacks could be simulated either by using actual equipment or by creating an electronic image of an attacking force. The intent of the simulation is to cause the target state to believe that a hostile force is approaching and to rise to meet the threat so that the surveillance force can monitor and evaluate the response. Under such circumstances it seems proper to conclude that the means employed, the collateral act, constitutes a threat to the peace and security of the target state and hence a violation of the U.N. Charter⁸¹ and the U.N. Declaration of Friendly Relations and Cooperation Among States.⁸² The clearest example of such illegal means would be the physical

⁷⁹ *Id.* at 13. For illustration, see 18 U.S.C. §§ 793, 794, 795, 796, 951, 952, & 953 (1970).

⁸⁰ *Id.* at 12.

⁸¹ U.N. CHARTER, Art. 2, paras. 4 & 7.

⁸² Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, Oct. 24, 1970. Doc. A/Res/2625 (XXV).

SURVEILLANCE

penetration of the territory of the target state in violation of its domestic law.⁸³ The possibility that the manner in which the activity is conducted would be illegal, however, does not lead to the conclusion that surveillance *per se* should be ruled illegal.

The question that remains then is this: Assuming there are no illegal means employed—no illegal collateral acts involved—do surveillance activities violate any of the target state's rights under international law? This question brings the interrelated concepts of political independence and nonintervention to the foreground. Article 2(4) of the U.N. Charter prohibits "the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with" Article 1 of the Charter. Article 2(7) of the Charter prohibits intervention "in matters which are essentially within the domestic jurisdiction of any state."

The meaning of "political independence" is difficult to pin down. "Political independence" is here defined as the sum of activities which one state may engage in without creating a right to intervene in another state.⁸⁴ We are left, then, with the task of defining "intervention" and of determining whether surveillance is an act of prohibited intervention.

Intervention has been defined as the "dictatorial interference by one state in the affairs of another state for the purpose of either maintaining or changing the existing order of things."⁸⁵ "It concerns, in the first place, the external independence, and in the second either the territorial or personal supremacy. But it must be emphasized that intervention proper is always *dictatorial* interference, not interference pure and simple."⁸⁶

The term "dictatorial" has traditionally been construed to involve either the use or threat of use of coercion. While it is true that today political independence "is susceptible to impairment by means not involving force or the threat of force,"⁸⁷ it is equally clear that not all activities of one state which have a consequence in another state amount to prohibited intervention.⁸⁸

There can be little question that the target states *feel* that surveillance activities either pressage the future use of force by

⁸³ ESSAYS ON ESPIONAGE, *supra* note 10 at 12; D. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW, 29-38 (1958).

⁸⁴ BOWETT, *supra* note 83 at 44-51.

⁸⁵ VON GLAHN, *supra* note 29 at 163.

⁸⁶ OPPENHEIM, *supra* note 27 at 305.

⁸⁷ BOWETT, *supra* note 83 at 45.

⁸⁸ VON GLAHN, *supra* note 29 at 163; OPPENHEIM, *supra* note 27 at 305.

60 MILITARY LAW REVIEW

the observing state or that the activities constitute an unauthorized intrusion into their domestic affairs.

It seems clear that absent other circumstances, such as the existence of belligerent relations between the observing and observed states or an announced intention of the observing state to conquer or invade the target state, the degree of coercion involved in surveillance falls below the level which would rule the coercion impermissible under the U.N. Charter. The rule which seems to emerge is that surveillance activities alone do not amount to prohibited acts but they are some evidence of an aggressive intent. The threat (if there be one) is not a direct result of the acts of surveillance. Rather if a threat results it is indirect and secondary; the threat of the use of force in the future.

A further reason for finding the degree of any coercion here involved to be *de minimis* is founded on the fact that these activities do not result from an act of the observing state. States originate the target transmissions voluntarily according to their own schedules. The observing forces merely "soak up" the results that flow from the target state's activities. We have seen that the generating state knows the signals created can be heard outside the boundaries of the state. Under such circumstances it is unreasonable to ask international law to declare illegal any activity which has as its sole purpose the collection of such signals. It is admitted that the place of collecting has much to do with the propriety of the collection, *i.e.*, within the territory or on the high seas.

Reference to American domestic law regarding a citizen's right to privacy will assist in defining the limits of surveillance activities. An American citizen does not have an absolute right to privacy. Rather he is protected "against unreasonable searches and seizures."⁸⁹ The courts have utilized two concepts to identify protected interests; expectation of privacy⁹⁰ and plain view.⁹¹

The plain view doctrine holds that mere observation by a person from a place he rightfully occupies without an accompanying physical entry onto private property will not violate the property owner's privacy.⁹² This doctrine has been applied in cases in which officers standing upon public property looked into car windows,⁹³ or windows of dwellings,⁹⁴ and also when the observations were

⁸⁹ U.S. CONST. Amendment IV.

⁹⁰ See *Katz v. United States*, 389 U.S. 347 (1967).

⁹¹ See *Harris v. United States*, 390 U.S. 234 (1968).

⁹² *Id.*

⁹³ *Nunez v. United States*, 370 F.2d 538 (5th Cir. 1967)..

⁹⁴ *People v. Wright*, 242 N.E.2d 180 (Ill. 1968).

SURVEILLANCE

made by officers while on the subject property in pursuit of legitimate business.⁹⁵

The expectation of privacy doctrine holds that . . . “[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, . . . is not a subject of . . . protection.”⁹⁶ The Supreme Court suggested a two-part requirement for the existence of a valid expectation of privacy: (1) The person must exhibit an actual (subjective) expectation of privacy; and (2) the expectation must be one that society is prepared to recognize as “reasonable.”

The rationale of the expectations of privacy doctrine of domestic law is applicable to the issue of surveillance between the states of the world—particularly if the issue is limited to the general question of the legality of surveillance *per se*. Analysing reconnaissance activities we have seen that while states hold strong *wishes* that contents of their transmissions remain private, they have no *expectation* that their transmissions will be “private.” Therefore there is no expectation of privacy which international law should protect if we follow the expectation of privacy concept. However, we should not stop our analogy here. The real value of this doctrine is its emphasis on the reasonableness of the desire that law protect a preference for secrecy.

The world community is primarily concerned with promoting international peace and security. Modern technology has developed weapons and delivery systems which make sudden, totally crippling attacks a real possibility. Further the potential suddenness of these attacks has reduced reaction time to minutes and seconds. These modern conditions have added yet another possible cause for a breach of the peace: accident or mistake. People deciding in such a short time frame may be mistaken. Therefore it is in the best interest of the world to insure that each state has full information on the preparedness and deployment of the military forces of other states and a good understanding of their purposes and intentions. This interest is best served by a full and complete exchange of the type of information collected by surveillance forces. This has been termed the “red-light function.”⁹⁷ On the other hand laying one’s defenses open to a potential enemy makes a state vulnerable to attack—surprise or otherwise. This has been termed the “green-light function.”⁹⁸ The absence of secrecy prevents a state from exerting its maximum

⁹⁵ *Ellison v. United States*, 206 F.2d 476 (D.C. Cir. 1953).

⁹⁶ *Katz v. United States*, 389 U.S. 347, 351 (1967).

⁹⁷ *ESSAYS ON ESPIONAGE*, *supra* note 10 at 42.

⁹⁸ *Id.*

60 MILITARY LAW REVIEW

leverage on the political and economic fronts of international relations.

It is suggested that the paramount interest of the world community in preventing the use of force is to resolve differences between nations. Openness between the states of the world will not only help prevent threats to the security of the states involved but will also promote the development of friendly relations and cooperation among the states. For those reasons surveillance *per se* should not be defined as prohibited intervention. The issues raised by the "green light functions" are most properly respected by recognizing and defining the limits beyond which surveillance becomes prohibited.

An additional argument may be made for the proposition that surveillance is not an unlawful intervention even if such activities are construed to be the use or threat of use of force in an impermissible degree. This argument would justify surveillance as an act of self-help by the observing state in its self-defense.⁹⁹ The obvious difficulty encountered by this argument is that the *sine qua non* of an act taken in self-defense (surveillance) is delictual conduct of the target state. Customary international law requires first that there be a breach of a legal duty owed to the state who wishes to act in self-defense.¹⁰⁰ However, that alone is not enough. The danger defended against must be "instant, overwhelming, leaving no choice or means and no moment for deliberation."¹⁰¹

Generalized surveillance such as we are dealing with here may be motivated by simple suspicions or may be basically prophylactic. It is usually not directed against the immediate threat contemplated by customary international law. Surveillance activities are fishing expeditions which seek evidence of a threat to the observing state's security. Therefore the question becomes where is the breach of a duty owed to the observing state by the target state which may justify surveillance under this approach?

First, no one will argue with the statement that a state has the right to use force to protect itself against attack.¹⁰² Further right to use force pre-emptively in self-defense has been declared permissible where only a threat of invasion existed.¹⁰³ Consider-

⁹⁹ VON GLAHN, *supra* note 29 at 163.

¹⁰⁰ BOWETT, *supra* note 83 at 9.

¹⁰¹ Letter from Secretary of State to the British Minister, 6 WORKS OF DANIEL WEBSTER 306 (12th ed.). See also M. McDUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 231-32 (1961).

¹⁰² BOWETT, *supra* note 83 at 9.

¹⁰³ Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 HAGUE RECUEIL DES COURS 455, 497-99 (1952);

SURVEILLANCE

ing those rights, it is reasonable to allow a state the opportunity to discover whether and where an attack is being mounted provided the steps taken to collect such information are proportional to the threat realistically perceived.¹⁰⁴ Examples of such steps are the declarations of air defense identification zones which have been made by the United States (ADIZ) and Canada (CADIZ).¹⁰⁵

We have noted that not all acts of a state which have a consequence in another state are impermissible. In the case of surveillance activities it seems clear that the direct consequences are not sufficiently dictatorial or coercive to be treated as unlawful force. Indeed if any conclusion is forced upon the target state as a result of monitoring activities it would be that aggressive designs must be discarded since they will be uncovered. As we have said such a consequence should be encouraged, not barred. Therefore surveillance *per se* should be treated as a variation of permissible persuasion.

However, the problem lies not so much with the acts themselves but with the underlying motivation of the collecting state and the ultimate use to which the data is put. It is not enough to say merely that surveillance is not *per se* a violation of international legal norms. The preceding material has pointed to the serious dangers that exist hand-and-glove with the benefits to be gained by allowing monitoring. These dangers may well be realized if the right to monitor is abused. Limits must be drawn which will allow for the "red light" function and prevent the "green light" function.

There are two different conceptual foundations for determining proper limits for surveillance the applicability of which depends on the classification of the waters from which the monitoring acts occur. It is clear that domestic law of the target state can control all activities taking place within its internal and territorial waters with an exception for ships in innocent passage. The limits of surveillance from the high seas are defined by the existing gamut of international legal norms which control other aspects of the interrelationship between the states of the world. The primary norms are political independence,¹⁰⁶ territorial in-

Brownlie, *The Use of Force in Self-Defense*, 37 BRIT. YB. OF INT. LAW, 225 (1961).

¹⁰⁴ *Id.*

¹⁰⁵ McDUGAL & FELICIANO, *supra* note 101 at 212-13; WHITEMAN, *supra* note 28 at 495-98.

¹⁰⁶ U.N. CHARTER, Art. 2, para. 4.

tegrity,¹⁰⁷ sovereign equality¹⁰⁸ and nonintervention.¹⁰⁹ The distinction needed to be made is that surveillance *per se* is a neutral act. The legal status of the act will be determined by the intent which motivated the act. Therefore the focus of the inquiry as to whether an act complained of violated any of those legal norms will be what did the observing state intend when ordering the surveillance rather than the acts themselves.

The rule should be that surveillance is to be prohibited on an *ad hoc* basis only after a showing by convincing evidence that the collecting state is collecting information for a purpose which violates a norm of international law such as will foster the collecting state's aggressive objectives against the target state¹¹⁰ or carrying out a propaganda campaign within the target state.¹¹¹

The required evidence can be drawn from the setting,¹¹² the type of information sought, the past practices of the collecting state in utilizing such information or even from the act itself (it must be admitted that since the act may have sinister motives merely engaging in it may be evidence of such a motive). However simple distrust or suspicion such as that rooted in the Cold War is not enough to justify prohibiting surveillance. Obviously to do so would effectively bar surveillance activities since the states most likely to engage in surveillance activities are those who do distrust each other and who each believe the other to be fostering aggressive intentions. It is not what a state may do with the information collected but what that state will most probably do with it that must control.¹¹³

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at Art. 2, para. 1.

¹⁰⁹ *Id.* at Art. 2, para. 7.

¹¹⁰ BOWETT, *supra* note 83 at 48-49.

¹¹¹ *Id.* at 47-48.

¹¹² The importance of the setting in which the surveillance mission takes place is clearly underlined by the *Pueblo* Incident since, at the time of the mission, normal peace time conditions did not exist. Rather the relations between North Korea and the United States were governed by an armistice agreement which grew out of the Korean War and "provided for a cessation of hostilities and all acts of armed force in Korea until a final peaceful settlement [was] achieved." This condition causes great confusion when attempting to evaluate the North Korean's actions in the matter. For a more complete discussion of the issues raised, see Butler *supra* note 15 at 11.

¹¹³ It is recognized that it is a difficult thing to assess the motives for a particular act. However, the law frequently requires such distinctions and this should be no exception. It is further recognized that the most effective method of removing the potential for abuse inherent in surveillance activities is to remove the inducement to "cheat." The best way to accomplish that goal is to vest the power to monitor the states in someone other than the states, i.e., the Security Council of the United Nations. However, that possibility is not realistic in light of the immaturity of international political development.

SURVEILLANCE

The question remains as to how to treat monitoring activities occurring in the territorial sea during innocent passage. While the concept of innocent passage does not change the basis for evaluating the acts, *i.e.*, permitted or prohibited intent, it does impose additional burdens on all activities occurring during passage since only activities in furtherance of passing are allowed. Further restrictions are imposed by the fact that surveillance ships are warships. The presumption that a warship "threatens" shifts to the warship the burden of proving a good reason to be allowed passage in the first place. Again it is important to recognize that the disabilities surveillance warship suffers result not from her classification as a surveillance ship but rather as a warship.

States may prohibit warships from their territorial waters where no good reason for their entry exists. As to those territorial seas through which warships do have the right of innocent passage, surveillance should not change the character of the passage. However, the littoral state could prohibit the anchoring or heaving to of a warship for the purposes of monitoring the coastal state. The reason for allowing such a prohibition with respect to anchoring and heaving to rests on the fact that they are not within the ambit of passage and not on the fact that the ship was engaging in surveillance activities. The conclusion here is the same as in other ocean areas: surveillance does not change *ipso facto* the relationship between the state and the ship; evidence of an impermissible intent underlying the act will.

Finally, may a state protect itself from surveillance activities and avoid all of the issues raised here by the simple device of declaring defensive or security zones. The idea is at first attractive, but the attractiveness wanes as the unreasonableness of the necessary limits becomes apparent. First, enforcement of a ban on surveillance activities within such a zone would be difficult in that there is no certain way to determine whether a ship is gathering data or if it is even equipped to do so. All that is needed in terms of equipment is an antenna and a magnetic recorder and most ships carry such gear. Since the operation of such equipment does not emit any radiation it would be impossible for the enforcing state to know whether the equipment was being operated. Further most navigation and all piloting operations require visual or electronic reference to land. Therefore to be effective all warships would have to be banned from a declared area.

The ban on warships would not be so repugnant if the area included in such a zone could be reasonable. However, surveillance

activities, at least electronic surveillance, can be carried on from great distances. All that is needed is an antenna high enough to counteract the curvature of the earth. It is clear that the distance from the shore would have to extend well beyond the 12 miles to which the contiguous zone¹¹⁴ is limited and perhaps would have to extend for hundreds of miles seaward.¹¹⁵ Such a limitation if declared by all states would constitute an unreasonable restriction of the right of free use of the oceans.

The precedent of the U.S. ADIZ and the Canadian ADIZ over the Atlantic Oceans is not applicable to the case of surface surveillance ships since there is a significant difference between an unknown aircraft approaching a coastline at supersonic speed and an unknown vessel on the surface of the water approaching at 15 knots. The threat posed to the security of the coastal state is not the same either as to the immediacy or as to the potential devastation. Further, the Convention on the Territorial Sea specifically refused to recognize the applicability of security zones in the contiguous zones.¹¹⁶

V. CONCLUSION

Surveillance can be a valuable tool for the world community in its search for the peaceful settlement of disputes between individual states. Its principle value lies in its ability to expose threats to the peace, particularly the exposure of unusual military strength concentrations or the existence of an aggressive intent by a particular state. The principal danger lies in its potential for tempting the collecting state to make improper use of a discovered weakness. Perhaps the greatest fear in this area is that by exposing the weaknesses or deficiencies of a state, particularly in the political and economic areas, the states are irreversibly locked into a set bargaining hierarchy of superior-subordinate unless and until the "facts" of the situation change.

The dangers which are intertwined with the potential benefits of these activities are realized only if the motive for ordering the monitoring activities is to misuse the information collected. Therefore impermissible acts are defined by an impermissible intent, and existing norms of international law are the norms by which the intent should be measured. When making such determinations all matters which shed light on the intent of the

¹¹⁴ Convention on the Territorial Sea and the Contiguous Zone, TIAS 5639, Art. 24 (2).

¹¹⁵ McDUGAL & BURKE, *supra* note 25 at 517.

¹¹⁶ COLOMBOS at 111-13; WHITEMAN, *supra* note 28 at 483, 495-98.

SURVEILLANCE

collector are relevant and material. Convincing evidence of a prohibited motive makes any surveillance acts so motivated impermissible.

This comment's conclusions are the result of recognizing (1) the ambivalent character of surveillance activities, (2) the imprecision of looking solely to the acts of surveillance to determine their propriety, and (3) basis of the inherent evil lying in the motivation for the acts. The conclusion that surveillance activities should not be barred *ab initio* is based on the premise that if international organization is dedicated to maintaining peaceful relations between the states of the world, it is better to encourage open and full exchanges of information with particular emphasis on information as to military strength levels, the locations and movements of such forces and their capabilities. The conclusion that the limits of surveillance activities should be determined by the intent of the collector is not considered unreasonably difficult to administer. Hopefully, the near future will see the transfer of the monitoring function from the individual states to the Security Council or another supernational body with the resultant elimination of multiple divisive self-interests.

PERSPECTIVE

THE EVOLVING LAWS OF ARMED CONFLICTS*

R. R. Baxter**

Effects to develop and broaden the humanitarian law of war have proceeded along two parallel lines of development, which have now to some extent converged. The first line of development can be dated from 1953. In that year, the International Committee of the Red Cross convened a meeting of government experts to consider the protection of the civilian population against "blind weapons" and indiscriminate bombardment. On the basis of these and other consultations, the International Committee drew up "Draft Rules for the Limitations of the Dangers Incurred by the Civilian Population in Time of War," which were completed in 1956. While these were primarily directed to aerial bombardment, they would also of course have governed ground hostilities and bombardment by artillery and missiles. These rules, which the I.C.R.C. very much hoped would find their way into a convention supplementary to the Geneva Conventions of 1949, were approved by the International Red Cross Conference in New Delhi in 1957. But when they were presented to governments, they were received with a remarkable absence of enthusiasm. And so that undertaking actually ended in failure, although the I.C.R.C. was not prepared to concede defeat.

The whole matter came alive again with what I have been told were some words jotted on the back of an envelope by Colonel Draper, the distinguished British expert on the law of war. This happened at a further Conference of the International Red Cross in 1965, when, as a compromise, four principles, hastily drafted were incorporated in a resolution of the Conference. These principles were

*This article is adapted from Mr. Baxter's remarks to the Judge Advocate General's Conference, 2 October 1972, at Charlottesville, Virginia. The opinions expressed are those of the author and do not necessarily reflect those of any Government agency.

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60 MILITARY LAW REVIEW

- that the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited;
- that it is prohibited to launch attacks against the civilian populations as such;
- that distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible;
- that the general principles of the Law of War apply to nuclear and similar weapons;

These are not highly controversial principles. The adoption of the resolution with these principles takes the Red Cross effort up to 1965.

We must now shift to the other line of development, the scene of which was the United Nations. An International Conference on the Protection of Human Rights was held in Teheran in 1968. By this time, the two covenants on human rights, one on civil and political rights and the other on economic and social rights, had been drawn up in implementation of the Universal Declaration of Human Rights. This left a certain void in the work program of the Human Rights Commission of the United Nations. Also, by this time there had been the experience of the prolonged conflict in the Middle East and the difficulties over areas occupied by Israel. There had been the war in Viet Nam, there had been the war in Korea, and there had been the U.N. operation in the Congo. These amounted in their totality to a great deal of blood-letting which should in principle have been regulated by the Geneva Conventions of 1949. All of these circumstances inspired a resolution of the Conference, in which it recommended to the General Assembly that it ask the Secretary General to make a study of two subjects: One was the better implementation of the existing conventions. The second was what new treaties, what new law, might be needed in order to supplement the existing treaties. A General Assembly resolution of December 1968 responded to this recommendation. The Secretary General was called upon, under the terms of Resolution 2444, to make this study; the resolution also affirmed the principles which had first been adopted at the International Red Cross Conference in Vienna. At this point, the stage was set for a certain overlapping of function and for the potential of rivalry between the General Assembly and the International Committee of the Red Cross, the latter of which is, as I hardly need remind you, a private international

LAW OF WAR

organization. On the one hand, there was a continuing concern for human rights within the General Assembly, the Third Committee, the Human Rights Commission, and the Human Rights Division of the Secretariat, coupled with a hunger to do more to protect human rights in armed conflict. On the other side was the International Committee of the Red Cross, which had traditionally regarded itself, and quite rightly so, as the guardian, as the initiator, and as the spiritual custodian of the Conventions relating to the Protection of War Victims. Who was to take the lead in this field? Was the initiative to be taken by the United Nations or by the I.C.R.C.? On the surface there have been friendly calls for cooperation and reports of the closest possible collaboration between these two bodies. But beneath the surface, there is a certain spirit of rivalry and of competition for primacy which shows itself from time to time.

Now again we turn to the concern of the United Nations with the law of war. In response to the mandate given him by the General Assembly, the Secretary-General prepared a preliminary report in 1969. In 1970 he called together a group of experts to consider what the United Nations might do, and that year's report to the General Assembly set forth a number of ideas about what should be done, some of them based on the recommendations of the group of experts.

What was the International Committee of the Red Cross doing in the meanwhile? It got out its yellow pad and sharp pencils and fell to drafting proposals of its own. Some of them were revivals of what the I.C.R.C. had been thinking about since the early 1950s, that is to say the protection of the civilian population against what it liked to refer to as indiscriminate warfare. And the International Committee convened a conference of government experts in the spring of 1971 to consider these proposals. As you may recall from the history of the drafting of the Geneva Conventions of 1949, the I.C.R.C. had followed this procedure in the past. It had called together groups of experts after it had prepared its own preliminary drafts, and it had revised and polished its drafts in the light of what the experts had said. The next stage was that the drafts were laid before an International Red Cross Conference and discussed there. They were then sent around to governments for comments, and then finally the texts which had been refined in this way were submitted to a diplomatic conference. The International Committee of the Red Cross was prepared to follow this same procedure in 1971, but because of the increasing size of the international community, it decided to invite government experts from 40 different countries.

60 MILITARY LAW REVIEW

The work which was to be done related both to international and to noninternational armed conflicts. As you know, the only real law that there is at the moment on internal armed conflicts is Article 3 common to the four Geneva Conventions of 1949. The International Committee of the Red Cross was thinking in terms of an elaboration of the law of Article 3 in the form of a complete new protocol to the Conventions of 1949. But they had also devoted a great deal of attention to various aspects of the law with respect to international armed conflicts which required elaboration. The third principal field, which proved to be one that stood almost by itself, was the elaboration of further medical law for the protection of the wounded and sick and of those who cared for them.

Even with these expert delegations from approximately 40 countries, there were complaints that this was not sufficiently representative group. We heard over and over again that there were not enough people from developing countries. Where experts could have been found in some of these countries, I am not quite clear. But the fact was that there was a widespread sentiment that this was not a properly representative body. The I.C.R.C. yielded to the force of public opinion and scheduled a second conference of government experts; this time it invited all of the parties to the Geneva Conventions of 1949, of which there are now roughly 135. In preparation for this gathering, which was held in Geneva in the spring of 1972, the I.C.R.C. had drawn up two protocols, one on international armed conflicts and the other on non-international armed conflicts. Meanwhile, the United Nations was holding back and waiting to see what the I.C.R.C. would do. The 1971 and 1972 reports of the Secretary General to the General Assembly were little more than reports of what had happened at the two conferences of government experts.

At the Conference of Government Experts which was held in Geneva in the spring of 1972, there were delegations from roughly 75 countries—a fairly good proportion of the parties to the Conventions of 1949. There was no representation from the People's Republic of China, although the PRC, as a party to the Conventions, was invited to send experts. (Strangely enough, the Republic of China is not a party to the Conventions of 1949.) But North and South Korea sent delegations, as did the Republic of Vietnam, but there was no one from Hanoi. There was a vocal Cuban delegation. The delegations from developing countries were better represented than they were the previous year. All in all, there were 400 purported experts on the law of war to go over

LAW OF WAR

the texts that had been prepared by the International Committee of the Red Cross.

One cannot simply assemble 400 people in one room and expect them to go to work on the texts before them. The Conference was organized in four commissions. One commission dealt with medical matters and included a working group on medical aircraft and medical evacuation. The second commission was concerned with internal armed conflicts. The third took up the law of international armed conflicts, and the fourth implementation of the Conventions.

For a delegation the size of that of the United States, it was not too hard to staff these four different commissions. For a developing country with a delegation of one or two people, the situation was very difficult indeed—doubly difficult in light of the fact that the one or two might actually not be very knowledgeable about this complex body of law. I recall a representative of a developing country in a committee speaking along these lines: "You people from developed countries know about this body of law. You've dealt with it in the past. You're familiar with the shades of meanings in the employment of various words. When someone asks about how one provision of a draft can be reconciled with a term in one of the 1949 Conventions, you know what's involved and what the issues are. We have no such sense of the subtleties, and it will take us some time to learn about this history the rest of you know about." Many delegates from developing countries are thus still engaged in reading themselves into this body of law. An enhanced knowledge of the law and what is in the Conventions will certainly be one of collateral benefits of the conference planned for 1974. Countries which have a fund of expertise in the humanitarian law of war can and should assist those states which are "developing countries" in terms of their knowledge of this law.

The United States Delegation had hoped that it would be possible to get down to some serious negotiating on the texts and that there would be some "indicative" voting to reflect the preferences of the experts. In fact, both proved to be largely impracticable. The idea of indicative votes—that is to say, not binding votes but a show of hands to show how people felt—was resisted by the socialist states and by many of the developing countries. There were a number of reasons for this. One was that some delegations apparently had instructions not to commit themselves to anything in any way whatsoever. Other delegations just had no sense of how they ought to vote. It would, for example, have been difficult for the United States Delegation to know how

60 MILITARY LAW REVIEW

to vote on numerous issues, without much more thought and without further refinement of the proposals. As a result, the products of the Conference are for the most part the reports of drafting committees (often consisting merely of compilations of the various texts proposed) and the lengthy reports of the rapporteurs on the course of the debates. The texts which will be submitted to the diplomatic conference in 1974 are now being drafted by the lawyers of the International Committee of the Red Cross, which serves as a sort of international drafting bureau.

Thus far I have talked about procedure. We must now turn to some of the principal issues of substance faced by the two Conferences of Government Experts.

There had been a great deal of talk in the United Nations and elsewhere about taking a human rights approach to the law of war. After all, if law had been laid down for the protection of human rights in time of peace, it would be natural to start thinking about the protection of human rights in time of war. A principal theme which ran through many of the statements made at the two Conferences was that one should think in terms of protection of the individual. In the view of some, this meant that the same basic safeguards would apply both in international and noninternational conflicts and that there would be a common body of law applicable in civil and international wars. The Norwegian experts in particular took this position.

As you can well understand, if one attempted to have uniform law for both international and noninternational armed conflicts, one would encounter all sorts of anomalies. It is easy enough to say that prisoners taken in both civil and international conflicts should be treated as prisoners of war and that the requirements as to fixed distinctive signs and bearing arms openly should be lowered in both instances. But the assertion that rolls so trippingly off the tongue overlooks the fundamental difference between the two types of conflicts and the need of governments in power to protect themselves in the event of domestic disorder and insurrection. The United States and other developed countries therefore resisted this notion that there should be identical law relating to prisoners and other matters in civil and international conflicts. The most that could be agreed upon was that there should be as much uniformity as possible in the international and noninternational protocols. The majority took the view that there would have to be different principles underlying the two instruments.

LAW OF WAR

A second great issue was whether special rules should be framed for wars of national liberation. At the first Conference of Government Experts in 1971, there was a certain indecisiveness about the nature of a "war of national liberation." At the second Conference, there was agreement by those who talked in these terms that such a war is an international conflict. A war of national liberation may take the form, they said, of an anticolonial war or a war fought against unlawful aggression or an unlawful occupation of territory. Many Arab and African states came out strongly for this concept, and they received a certain measure of support from the U.S.S.R. and other socialist states. The proposition was put that there had been an unlawful occupation of Arab territory by Israel and that the measures being taken by guerrillas and others against Israel constituted a war of national liberation of Arab soil from Israeli control. So far as anticolonialist wars are concerned, these were stated to be international conflicts because peoples fighting for self-determination and for recognition of their separate statehood should be recognized as international persons. These international persons are engaged in war with other states, and the conflicts accordingly are international ones within the meaning of Article 2 of the four Geneva Conventions of 1949. The difficulty with this view is, of course, that only "Powers" may become parties to the Geneva Conventions of 1949. A liberation movement in Angola or Mozambique or the population of an occupied territory is not a "Power." Since these groups could not be parties to the Conventions, no other State which is a Party could be compelled to apply the Conventions in conflicts with such groups. But the far greater danger was that the notion of a war of national liberation would entail a distinction between "good" and "bad" wars, between "just" and "unjust" wars, between the side which was fighting lawfully and the side which was fighting unlawfully in terms of the initial legality of the resort to force. Just as soon as one asserts that one belligerent is acting lawfully and the other is acting unlawfully, the door is opened to discrimination against certain war victims, to charges that the enemy is always the wrongdoer, and ultimately to barbarism. It is only by putting the victims of war on a basis of complete equality, whether they fight for the unlawful aggressor or for the country fighting in self-defense, that the protection of war victims—prisoners of war, the wounded and sick, and civilians—can be assured. Individual human beings will suffer if special powers and rights are given to those who fight just wars, lawful wars, or "wars of national liberation." And so the United States strongly resisted this whole notion of "wars of national liberation."

A third principal question taken up at the Conferences was the position of guerrilla fighters. There was, I think, a certain amount of sentiment that the requirements of Article 4 of the Geneva Prisoners of War Convention of 1949, inherited from the Hague Regulations, were somewhat too strict and that there could be an opening up of prisoner of war status to a wider category of people. A good deal was made of the MACV directive dealing with the categories of prisoners entitled to prisoner of war treatment. The argument was made that if the United States can do this sort of thing in Vietnam, why can we not, on a wider basis, give treatment as PWs to those who do not meet these four solid requirements of Article 4 of the Geneva Prisoners of War Convention of 1949. A number of delegations suggested that the requirements for prisoner of war treatment should be reduced to three: (1) that the individuals concerned should conduct their operations in accordance with the law of war; (2) that they should distinguish themselves from civilians by carrying arms openly, wearing a distinctive sign, or by some other means—that is to say that there should be a variety of means by which a combatant might declare himself as such; and (3) that they should be commanded by an officer responsible for his subordinates. To this the answer of the United States was, in the context of internal armed conflicts, a firm no. So far as international conflicts are concerned, the United States took the position that we could live with a requirement of openness, if it were shown by either the carrying of arms openly or by a fixed sign recognizable at a distance. But it was absolutely essential in the view of the United States that combatants should show their character either by carrying arms openly or by wearing a fixed distinctive sign—a helmet, armband, or something of that sort. So far as the third requirement of being commanded by an officer responsible for his subordinates was concerned, the position of our Delegation was that there should not only be a responsible commander but also that the troops should belong to a party to the conflict, so that there would be not just a responsible commander but a responsible party to the Conventions to which to look for redress.

The discussions sounded in many ways like the corresponding debates at the Hague Conferences in 1899 and 1907. Barbara Tuchman has a wonderful chapter in *The Proud Tower* on the politics of the Hague Conferences. As one reads over the proceedings of those Conferences and compares them with what was said in 1972, one has a certain sense of *déjà vu*. Ranged on the one side were and are countries which, whether in 1899, 1907, or 1972, rely upon civilian resistance, upon militia, upon the

LAW OF WAR

mobilization of the local population—countries without large standing armies. These are the ones which call for a broad definition of those entitled to treatment as prisoners of war. At the other extreme, the major military powers which rely on standing, regularly constituted forces do not welcome the thought of having to treat every combatant, every guerrilla, every civilian who takes a shot at the troops as a lawful combatant entitled to PW treatment. One could not help but feel that some of the international legal problems of the twentieth century are very little changed from those of the nineteenth.

The fourth area of concern was internal armed conflicts and how these should be treated. Article 3 of the four Geneva Conventions of 1949 is the only provision in the treaty law which bears on the subject. The position of the International Committee of the Red Cross, which I believe was shared by the United States Delegation, was that there should be substantially more protection extended to the victims of internal armed conflicts. The characteristic pattern in these days is that there is an inter-relationship between internal and international conflicts. Internal conflicts often grow into international ones, and international conflicts spill over into internal ones. Article 3 by itself is too fragile an instrument.

The crucial question was naturally how to define a noninternational conflict, thereby establishing the threshold at which the law for such conflicts would become applicable. Most of the experts seemed to be in agreement that a protocol on noninternational armed conflicts should not apply to riots in the streets, disturbances, city tumult, banditry, and other forms of relatively low-level violence. These do not bear sufficient resemblance to war to warrant their being governed by war law. But to identify the precise level of internal violence calling for application of a body of international humanitarian law, deriving from the law governing hostilities between states, is not a simple matter. The British were naturally much concerned about the situation in Northern Ireland and wanted a rather high threshold for the application of any new law. The United States Delegation seemed disposed to put the floor somewhat lower, probably because we are not faced with any insurrection or large-scale violence in these days.

Some other delegations which thought in a rather simplistic and sentimental way about internal conflicts were willing to see PW treatment extended to all sorts of participants in such conflicts. Most of the major powers mistrusted the liberal conferment of PW status and would have preferred, as the United States did,

60 MILITARY LAW REVIEW

to see a strengthening of the judicial safeguards for those apprehended during civil conflicts. We discovered that a number of the developing countries were as worried as we were about the definition of the scope of applicability of a protocol on non-international armed conflicts. The Indonesians, for example, being no strangers to civil war, were steadfast in their resistance to making very much law, derived from the law on international war, applicable to internal armed conflicts. This is one of the cases in which the lines between developed and developing countries, large military powers and small military powers, vanished; and one found alliances of states drawn from different systems, geographical areas, and power structures.

The International Committee of the Red Cross also proposed that in mixed civil and international conflicts, international law be applied. Again developing countries with experience of internal conflicts resisted this idea, as did the United States and most of its NATO allies. The view of the I.C.R.C. has now, I think, been shunted aside. We will have only international armed conflicts and noninternational conflicts and no special body of law applicable to conflicts of mixed character.

I mentioned at the outset that the development of international humanitarian law had been stimulated by the concern of the I.C.R.C. with the protection of the civilian population from indiscriminate bombardment. A number of provisions on permissible targets were incorporated in the two draft protocols. They sought to establish a category of "objects of a civilian character" which were not to be attacked. "Objects indispensable to the survival of the civilian population" was another term employed. This is the old, old problem of the extent to which the civilian population can be protected from aerial bombardment, or for that matter artillery fire and the use of naval ordnance. The United States and the United Kingdom were firm in asserting that the Conference should take a restrained attitude toward any new law in this field.

Categorical statements are always dangerous, but I think that it may be fair to say that any articles which might be drafted on aerial bombardment would have the effect of making nuclear bombardment unlawful and could call for drastic restrictions on bombardment of a conventional character. On the other hand I have the feeling that a number of military people are not quite as sensitive as they might be to a very large body of public opinion on this subject. I am quite frankly worried about what the reaction of the Senate Foreign Relations Committee will be when the conventions which emerge from this process are laid

LAW OF WAR

before the Committee. Will Senators say that the draftsmen of the treaties have gone too far in the protection of the civilian population or will the Committee be heard to say that the treaties do not go far enough and that the United States Government should have been more forthcoming in accepting safeguards for civilians? With the present composition of that Committee, we may face a problem, not by way of having given away too much but by not having asked for enough.

A sixth principal area of concern related to weaponry—the types used as well as the mode of their employment. The Swedish Delegation, reflecting the views of a country which assumes a certain moral superiority, took the lead in calling for restrictions on certain weapons and their use. It acquired support from the delegations of the Netherlands, Switzerland, Egypt, Mexico, and a number of other countries as well. Proposals were put forward which would prohibit the use of nuclear weapons, chemical and bacteriological weapons (a sensitive issue in view of our difficulties on the ratification of the Geneva Protocol of 1925), and weapons having an adverse effect on the environment. I think that deep in their hearts the proponents of these extreme measures had and have no hope of success but put them forward for political reasons and to give completeness of coverage to the drafts. Where we face some immediate danger is with respect to napalm and other incendiaries. Last year the General Assembly asked the Secretary General to make a study of these weapons, of how they are employed and what their effects are. The Secretary General convened a group of experts to advise him. There was no United States military expert in the group, although there was one American, a doctor, who was invited by the Secretariat. This report will be submitted to the General Assembly at this year's session.

Another weapon about which Sweden was concerned was fragmentation bombs which project small caliber pellets. Although there is no current study of such weapons going on in the United Nations, Sweden has said that it will bring up this subject at this year's session of the General Assembly. Sweden is bearing down heavily on incendiaries and fragmentation weapons and will receive a certain amount of support in its campaign. There are difficult times ahead for the large military powers on these two issues.

The seventh major matter taken up at the meetings of 1971 and 1972 was better implementation of the existing conventions. There has been no designation of a Protecting Power within the contemplation of the Geneva Conventions of 1949 since the Second

60 MILITARY LAW REVIEW

World War. All attempts to secure Protecting Powers in Viet Nam have been unsuccessful. At the 1972 Conference, the United States put forward a proposal that if the parties have not agreed on a Protecting Power, each party to the conflict would put forward a list of states which would be acceptable as Protecting Powers. If the same state showed up on both lists, there would be an attempt made to enlist that state as the Protecting Power. In the event of failure to secure agreement in this way, the International Committee of the Red Cross would assume not only the "humanitarian" functions of the Protecting Power but the full functions of a Protecting Power across the board. The I.C.R.C., to our gratification, said that it would be willing to undertake that task. This proposal by the United States achieved a considerable degree of support. But there was a great deal of resistance to it from the Soviet Union and other members of the Soviet bloc.

Other proposals were made by several delegations about implementation of the Conventions. It was suggested that there should be a permanent body to assume the functions of the Protecting Power. There were various proposals concerning instruction of the armed forces and teams to assist in securing compliance with the Conventions and to make inspections. Some delegations thought that there should be regular meetings of the parties to the Geneva Conventions of 1949. The I.C.R.C. brought up the old question of superior orders. Fortunately, this last was dropped by the wayside.

Finally, there was a commission to deal with the medical provisions, which were actually drafted and are in generally good shape. This was the one case in which the Conference was able to draw up articles which seem to me to have a rather good chance of acceptance with only minor drafting changes. The articles are well drafted, their implications have been thought through, and people understand what the words mean; and so there will be some sound new medical provisions in the protocols on international and internal armed conflicts. There will be new arrangements about medical aircraft, allowing them greater freedom of evacuation. The United States Delegation wanted to have arrangements whereby medical aircraft could operate over the battlefield without prior agreement. That idea did not secure general support, but, subject to agreement, there will be wider scope for the use of medical aircraft. I have by no means done justice to the very solid record of accomplishment on the medical articles.

LAW OF WAR

What of the future? The International Committee of the Red Cross is back at its headquarters with new yellow pads and new sharp pencils, preparing new drafts for submission to the next International Red Cross Conference, to governments, and finally to a diplomatic conference which will be held in Geneva in 1974. Within a group of friendly states, including a number of NATO countries, there have been certain deliberations carried on with a view to concerting policy. The United States Government will do everything possible, I am confident, to secure support for its views prior to the 1974 conference.

On the United Nations side, there will be a continuing watch to see if the International Committee of the Red Cross moves ahead. If the I.C.R.C. stumbles and falls, the United Nations will move in on this subject in a large way. The I.C.R.C. is actually a much more effective, nonpolitical instrumentality for work in this field, and it is to our common interest to keep the center of activity in that organization. The United Nations cannot be kept from becoming increasingly concerned with weapons, not—unfortunately—through the route of disarmament (as the United States Government seemingly would prefer to have it done) but by way of treaty prohibitions both on the battlefield use of certain weapons and on the use of certain weapons against civilians.

My own impression is that the job of bringing up to date the humanitarian law of war is being rather well done by the International Committee of the Red Cross and the conferences that it has convened. Inevitably, as a humanitarian organization, it leans in the direction of placing restrictions on belligerents and of extending new protections to civilians and other war victims. These may not always be acceptable to the United States. On the other hand, there is real uncertainty and a sense of unease about what might be done in the United Nations in the future.

The development of international humanitarian law deserves your close attention over the next two or three years.

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CIVILIZATION OF MILITARY JUSTICE: GOOD OR BAD*

By Professor Delmar Karlen**

It is a very great honor to be allowed to pay tribute to the father of military legal education. Colonel Young commanded the first Judge Advocate General's School during World War II and so trained most of the officers who have been administering the Army's legal system ever since. The School was disbanded in 1946, but when it was reactivated in 1950 at the time of the Korean conflict, Colonel Young was again in command. His work laid the foundation for the Army's present system of legal education, centered here at Charlottesville.

I was a member of the first Officers' Candidate Class, convened at Ann Arbor in the summer of 1943. While at Ann Arbor, I realized that I was studying an inferior brand of justice. Why? Because it was different from civilian justice, of course! That's all I knew, or needed to know, to come to the conclusion that military justice was a second-class product. I knew almost nothing about criminal justice in civilian life, having come to the army after five and one-half years of practice on Wall Street; but I knew that it was different from military justice and therefore better. That was enough.

I am ashamed now of my callow reasoning then, but suppose that I should derive some consolation from the fact that it was not much different from the reasoning of some members of the Supreme Court of the United States years later when they decided cases like *Reid v. Covert*,¹ and *O'Callahan v. Parker*.² Nor was it greatly different from the reasoning that underlies much of the hostile criticism still being directed against military justice. It sprang from a profound well of ignorance of both military justice and civilian criminal justice.

We hear talk today about the need for further "civilianization"

*This article is an edited version of Professor Karlen's remarks on the occasion of the dedication of the Edward H. (Ham) Young Chair of Military Legal Education at The Judge Advocate General's School on 31 August 1972.

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¹354 U.S. 1 (1957).

²395 U.S. 258 (1969).

60 MILITARY LAW REVIEW

of military justice, as if that were an end in itself, a goal to be sought without regard to a fair appraisal of the strengths and weaknesses of both systems.

But who believes that criminal justice in civilian life is perfect? Do we want to import into military justice the almost interminable delays that characterize civilian justice throughout most of the nation? Do we want to wait weeks or months before a grand jury can be convened to rubber stamp a prosecutor's decision to proceed, without telling the accused the evidence against him? Do we want more weeks or months to intervene before trial can be reached? Do we want in the meantime to have lawyers engage in every sort of pretrial maneuver that can further delay the trial without coming an inch closer to the really important question of guilt or innocence? Do we want continuances to be granted right and left because of the engagements of counsel and a recurring inability to get the accused, the witnesses, the lawyers, the jury and the judge all together in one courtroom at one time? Do we want men accused of crime to be released on bail on their own recognizance for months on end so that they can commit further crimes or engage in wild attacks on the judiciary and the rest of the "establishment" to the delight of college audiences and the enrichment of the speakers? Do we want to spend months picking juries and in the process brainwashing them? Do we want hung juries and retrials? Do we want weeks, months or even years to elapse before an appeal or a succession of appeals can be heard and decided, sometimes on the basis of specious arguments a lawyer is forced to put forward against his own professional judgment and his conviction that there is no merit in them?³ Do we want to spend ten or twelve years more in collateral attacks and postconviction remedies?⁴

I think the answer to all these questions must be "No". We do not want blindly to copy civilian justice. Its shockingly bad record of delay does not justify the naive faith held by some that civilian justice is necessarily and inevitably superior to military justice.

Military justice is speedy, as even its most severe critics admit. The Sixth Amendment guarantee of a speedy trial means something in the military system of justice, but up to now it has meant almost nothing in civilian systems. Civilian courts have refused to dismiss prosecutions that had been pending for as

³ *Anders v. California* 386 U.S. 738 (1967); *See also ABA STANDARDS FOR CRIMINAL JUSTICE RELATING TO CRIMINAL APPEALS*, 74 *et seq* (1970).

⁴ On post conviction and other delays, *see generally D. KARLEN, JUDICIAL ADMINISTRATION: THE AMERICAN EXPERIENCE*, 60 *et seq* (1970).

MILITARY LEGAL EDUCATION

long as eight years before trial was reached.⁵ Only recently have some civilian courts begun to try to make the guarantee of a speedy trial meaningful by mandatory, specific timetables. How mild these timetables are is shown by the fact that the ones recently promulgated both by the United States Court of Appeals for the Second Circuit⁶ and the New York Court of Appeals⁷ require only that a case be brought to trial within six months from the time of arrest. Whether such rules will succeed in their limited objective remains to be seen. As of today, the recommendation of a four month timetable from arrest to trial made by the President's Commission on Law Enforcement and the Administration of Justice⁸ expresses a remote ideal, not a reality for most civilian jurisdictions. In short, as the leaders of the bench and bar at the National Conference on the Judiciary concluded in March 1971, our present system of civilian criminal justice "fails to guarantee either speedy trials or safe communities."⁹ That conference was addressed by the President of the United States, who had this to say:

"Everyone is for a "speedy trial" as a constitutional principle, but there is a good deal of resistance to a speedy trial in practice. * * *

"It is not an impossible goal. In criminal cases in Great Britain today, most accused persons are brought to trial within 60 days after arrest. Most appeals are decided within three months after they are filed.

"But here in the United States, this is what we see: In case after case, the delay between arrest and trial is far too long. In New York and Philadelphia the delay is over five months; in the State of Ohio, over six months; in Chicago, an accused man waits six to nine months before his case comes up.

"In case after case, the appeal process is misused—to obstruct rather than advance the cause of justice. Throughout the State systems, the average time it takes to process an appeal is estimated to be as long as 18 months. The greater the delay in commencing a trial, or retrial resulting from an appeal, the greater the likelihood that witnesses will be unavailable and other evidence difficult to preserve and present. This means the failure of the process of justice.

"The law's delay creates bail problems, as well as overcrowded

⁵ United States v. Cohen, 37 FRD 26 (SD NY 1965); United States v. Dillon, 183 F. Supp. 451 (S.D.N.Y. 1960).

⁶ Rules Regarding Prompt Disposition of Criminal Cases, United States Court of Appeals for the 2d Circuit, effective July 5, 1971.

⁷ The Rules now appear on a modified, watered-down version in Ch. 184 of Laws of New York 1972 (§ 30.20 CRIMINAL PROCEDURAL LAW).

⁸ THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY, 155-56 (1967).

⁹ Justice in the States, address at the National Conference on the Judiciary, 267 (1971).

60 MILITARY LAW REVIEW

jails; it forces judges to accept pleas of guilty to lesser offenses just to process the caseload—to "give away the courthouse for the sake of the calendar." Without proper safeguards, this can turn a court of justice into a mill of injustice."¹⁰

The Chief Justice also addressed the Conference and said:

"Today the American system of criminal justice in every phase—the police function, the prosecution and defense, the courts and the correctional machinery—is suffering from a severe case of deferred maintenance. By and large, this is true at the state, local and federal levels. The failure of our machinery is now a matter of common knowledge, fully documented by innumerable studies and surveys.

"As a consequence of this deferred maintenance we see

First, that the perpetrators of most criminal acts are not detected, arrested and brought to trial;

Second, those who are apprehended, arrested and charged are not tried promptly because we allow unconscionable delays that pervert both the right of the defendant and the public to a speedy trial of every criminal charge; and

Third, the convicted persons are not punished promptly after conviction because of delay in the appellate process."¹¹ * * *

Such sober conclusions from such sources should give pause to those who would make military justice a carbon copy of civilian criminal justice. Justice delayed is indeed justice denied, not only for the accused, but also for the victims and potential victims of crime and the general public. Without promptness in the disposition of charges, the goals of criminal justice are frustrated. What good does it do to punish man when he and the community at large have almost forgotten what crime he committed? Very little, I submit, at least in the ordinary case.¹² Long-delayed punishment, instead of accomplishing the rehabilitation of the offender is more likely to breed resentment on his part. Instead of deterring others, it is likely to invoke their sympathy for the offender. As Chief Justice Burger said in his address on the State of the Judiciary to the American Bar Association in 1970:

"If ever the law is to have genuine deterrent effect on the criminal conduct giving us immediate concern, we must make some drastic changes. The most simple and obvious remedy is to give the courts the manpower and tools—including the prosecutors and defense lawyers—to try criminal cases within 60 days after indictment and let us see what happens. I predict it would sharply reduce the crime rate."¹³

¹⁰ *Id.* at 5-6.

¹¹ *Id.* at 10-11.

¹² Of course, if the crime is so serious that the offender must be put out of circulation, either permanently or for a long period of time to prevent him for committing further crimes, incarceration helps, even if late.

¹³ Burger, *The State of the Judiciary—1970*, 56 ABAJ 929 (1970).

MILITARY LEGAL EDUCATION

Thus far I have been speaking of only one characteristic of civilian criminal justice which should not be emulated by the military—its delays. There are others.

Paradoxically, while some criminal proceedings in the civilian courts move far too slowly, others move far too quickly. This is the phenomenon of assembly line justice, which can be observed in almost every metropolitan court in the land. Because of inadequate personnel, both in numbers and quality, and because of the cumbersome and dilatory procedures followed in some cases, the civilian machinery of criminal justice is overburdened to such an extent that judges and lawyers are forced to resort to shortcuts in other cases. Courtrooms in which minor cases are heard are crowded to capacity, with defendants, police officers, witnesses, bailiffs, clerks and spectators milling around in wild confusion, jostling each other and spilling out into the corridors. The din is so loud that few persons present can hear what is going on in the front of the courtroom. Pleas of guilty are received and sentences imposed at the rate of about one case a minute. A few cases are dismissed and a few others tried, but still dozens, scores, or even hundreds of cases may be disposed of in a single day in a single courtroom. As one experienced observer of civilian justice has said:

"For most defendants in the criminal process, there is scant regard for them as individuals. They are numbers on dockets, faceless ones to be processed and sent on their way."¹⁴

The same thought is echoed by the President's Commission on Law Enforcement and the Administration of Justice:

"The Commission has been shocked by what it has seen in some lower courts. It has seen cramped and noisy courtrooms, undignified and perfunctory procedures, and badly trained personnel. It has seen dedicated people who are frustrated by huge caseloads, by the lack of opportunity to examine cases carefully, and by the impossibility of devising constructive solutions to the problems of offenders. It has seen assembly line justice."¹⁵

Even in courts handling more serious cases, the picture is not much different. Arraignments are handled on a mass production basis. The judge spends 3 or 4 minutes on each case, more often than not accepting a plea of guilty—not to the offense initially charged, but to a lesser offense carrying a lighter penalty. The reason, of course, is plea bargaining between defense counsel

¹⁴ Barrett, *Criminal Justice, The Problem of Mass Production IN THE COURTS, THE PUBLIC AND THE LAW EXPLOSION*, 85, 87 (W. Jones, ed., 1965).

¹⁵ President's Commission, *supra* note 8 at 128.

60 MILITARY LAW REVIEW

and the District Attorney's office. Charges of felonies like armed robbery or aggravated assault are in some jurisdictions routinely reduced to misdemeanors. Most plea bargaining is not based on considerations of community safety or on rehabilitation of the offenders, but on crowded calendars and the necessity of disposing of vast numbers of cases without trial.¹⁶ Yet it is taken for granted by most judges and lawyers, even when its effect is to divest the courts of much of their responsibility. Not only are men allowed to plead guilty to less serious offenses than they have in fact committed; some are released outright without arraignment because prosecutors know that their cases will never be reached; and many men who should be arrested are not, because the police know that the courts cannot process their cases.

The result of slow motion justice in some cases and undue haste in others is not equal justice under law, but too often unequal injustice.

The military scene presents some refreshing contrasts to the civilian scene. A soldier in a court-martial is provided with meaningful counsel, not pro forma representation. He is not kept in the dark, but advised well in advance of trial what witnesses will testify against him and the substance of their expected testimony. He is made aware of what is happening at every stage of the proceedings. His trial is an individualized affair, separately scheduled and distinct from every other trial. The goal is a deliberative, thoughtful, unhurried proceeding, not a frantic ritual. This is true even when a plea of guilty is received.¹⁷ That being so, we must ask ourselves again: Why try to convert military justice into a carbon copy of civilian criminal justice?

There are other respects in which military justice, in my opinion, is superior to civilian military justice. One is the matter of courtroom conduct. In recent years, we have witnessed shocking episodes in civilian courtrooms. In one case a judge was kidnapped from the bench and murdered. In many others, deliberate and determined efforts have been made to disrupt the proceedings, often with the connivance and encouragement of the lawyers involved, and sometimes aided by the overreactions of the judges being baited. Too often such efforts have been successful, making a mockery of the judicial process and converting courtrooms into political soapboxes. Too

¹⁶ Kuh, *Plea Coping*, 24 N.Y.C. BULL, 160 (1967).

¹⁷ McGovern, *Guilty Plea—Military Version*, 31 FED. B. J. 88 (1972).

MILITARY LEGAL EDUCATION

often those responsible escape unscathed, thumbing their noses at the law.¹⁸

As President Nixon said at the Williamsburg Conference on the Judiciary mentioned before:

"Society must be protected from the exploitation of the courts by publicity-seekers. Neither the rights of society nor the rights of the individual are being protected when a court tolerates anyone's abuse of the judicial process. When a court becomes a stage, or the center ring of a circus, it ceases to be a court."¹⁹

Happily, military courts, while sanctioning, encouraging, and protecting vigorous and zealous representation by qualified counsel, have avoided the excesses found in civilian courts today. Again, why try to convert military justice into a carbon copy of civilian justice?

Finally, there are some respects in which military justice has been affording greater protections to those accused of crime than even now are afforded them in most civilian courts—full pretrial disclosure of the prosecution's cases, for example; automatic appellate review, including the review of the propriety of sentences; and full legal representation regardless of indigency. The civilian courts, under the prodding of the Supreme Court of the United States, are catching up with the military courts, but they still have a long distance to go. The superior protections provided the rights of the accused in military courts have been much discussed and well documented in law review articles,²⁰ and I need not discuss them further. All I should like to do is ask my usual question: why, if military justice is in advance of civilian justice, should it step backward? I am not suggesting, of course, that military courts are perfect, or that they have nothing to learn from civilian courts, but only that those who would improve military justice should stop romanticizing civilian justice and find out how it works in practice before clamoring for further "civilianization".

Now, having expressed my conviction that civilian courts have more to learn from the military courts than vice versa, I come to the question of why that is so.

The key to the high quality of justice in courts-martial today lies in the high quality of the personnel who man those courts—the military judges, in other words, and the prosecution and defense counsel. Their quality, in turn, depends mainly upon

¹⁸ Karlen, *Disorder in the Court Room*, 44 U. SO. CAL. L. REV. 996 (1971).

¹⁹ Justice in the States, *supra* note 9 at 7.

²⁰ See generally Moyer, *Procedural Rights of the Military Accused: Advantages over a Civilian Defendant*, 22 MAINE L. REV. 105 (1970).

60 MILITARY LAW REVIEW

the kind of training they have received. Most of them have been at Charlottesville or in predecessor schools. All military judges, and the overwhelming majority of the lawyers who act as prosecutors, defense counsel and appellate counsel in court-martial cases, have been through this mill. The only exceptions worth mentioning are lawyers who on relatively rare occasions are retained as defense counsel, military or civilian, by the accused. Even some of these men are former military lawyers or judges who have had the benefit of the same course or courses of instruction.

To be eligible for this training, a man must have credentials beyond admission to the bar. He must first become a member of the Judge Advocate General's Corps, surviving competition with others and a careful screening both as to his character and ability. Then, newly commissioned and briefly acclimated to military life, he undergoes an 8-week period of intensive training in his future duties, including a heavy concentration on military justice.

The basic course at The Judge Advocate General's School is rigorous and demanding. What makes the study of military justice different from anything the lawyer-student has experienced before is the fact that it is so concentrated, so coherent, so specialized, and so practical. It deals with a single judicial system, not flitting from one to another among 51 different systems, comparing majority rules and minority rules, and reconciling cases that do not need reconciliation. It treats substantive law and procedure as what they really are—different sides of a single coin—without any attempt artificially to divide them into separate compartments. It analyzes every step in the process of military justice from the preferring of charges to their ultimate disposition on appeal. It reveals what each person does at each stage and precisely how he goes about it.

This is a far cry from the way law is taught in civilian law schools, which are notoriously long on theory and short on practice. The wide gap between law school and practice has long been recognized, and most law schools do not attempt to bridge it. They say, with some justification, that they have a big enough job to do in teaching theory, and that practical training is better left to apprenticeship or to postgraduate programs of continuing legal education.

Apprenticeship sometimes works well, but more often it does not. For this reason, formal programs of continuing legal education have become increasingly popular since World War II. Some are quite elaborate, carefully planned and well-executed, but

MILITARY LEGAL EDUCATION

typically they are short, one-shot affairs, seldom lasting more than a few days on a full time basis or a few weeks on a part-time basis. No program of continuing legal education in civilian life approaches 8 weeks of full-time instruction.

Little, if any, recognition has been given to the fact that the army launched the first and probably the most successful program of continuing legal education in the nation. It was motivated by the same reason that led to the creation of civilian programs—dissatisfaction with apprenticeship and on-the-job training. Its goal was and is more ambitious than that of the civilian programs—nothing less than to equip the trainee to function with high efficiency immediately upon being assigned to duty. As stated by Colonel Douglass and Captain Workman:

The most rapid and most efficient method of bridging the gap between law school and full-scale military legal practice is military legal schooling. The young judge advocate has little chance to move quietly and easily into practice. When he reports at his first duty station, he must be prepared to assume the speed, accuracy, and professionalism of a more experienced practitioner. There is no "break-in" period.¹¹

The Judge Advocate General's School has been achieving its ambitious goal. In 1955 Major General Charles L. Decker, then Judge Advocate General of the Army, stated that the operation of the war-time school

... was so successful that many of us responsible for legal advice to major commanders would offer to accept one school-trained man in lieu of two lawyers without this schooling. Both in accuracy and output, it was a most profitable venture to accept one such young lawyer officer rather than two lawyers called into headquarters on temporary duty from batteries and companies.¹²

If all The Judge Advocate General's School did was to give its basic course to new officers four times a year, it could justify its position as a leading institution of legal education. But it does more. It offers each year a 36-week Advanced course for more senior officers, the men who are destined to become the military judges of general courts-martial and staff judge advocates, and to occupy other key positions in military law. It offers, in addition, a wide variety of specialized courses running from one to three weeks in duration, including one designed to qualify men to become military judges, especially in special courts-martial.

¹¹ Douglass and Workman, *The Educational Program for the Service Lawyer*, 31 Fed. B.J. 7, 23 (1972).

¹² *Id.* at 9.

60 MILITARY LAW REVIEW

The fact that military judges are given specialized formal training is another matter that has escaped public notice. The various civilian programs for judicial education are rightly hailed as one of the most significant developments in judicial administration in this century.²³ The first such program of significance was the Appellate Judges Seminar held under the auspices of the Institute of Judicial Administration at the New York University Law School. Many other programs for trial as well as appellate judges have been patterned upon it and are now in operation. But the Appellate Judges Seminar, granddaddy of them all, was started in 1956, 13 years after the Army's Judge Advocate School was started. True, that school in its original form was not for military judges alone, but it included them as well as others who had important roles to play in military justice. The Judge Advocate General's School therefore deserves recognition for one of the pioneering efforts in judicial education as well as for its pioneering effort in continuing legal education of the bar.

Finally, The Judge Advocate General's School engages in a broad program of research to help improve military justice, and an extensive program of publications to keep military judges and lawyers up to date on recent developments. All in all, it is a law center worthy of the name.

²³ Karlen, *Judicial Education*, 52 A.B.A.J. 1049 (1966).

BOOK REVIEW

The Three-Mile Limit of Territorial Seas, Sayre A. Swarztrauber,
U.S. Naval Institute, 1972.

The international community is deeply and currently engaged in an effort to "write a new law of the sea." Many nations, including the United States, have put forth comprehensive proposals designed to harmonize the multiple uses of the oceans. But in a fundamental sense, there can be no effective new law or new harmony without a thorough knowledge of the complex and interdependent process of authoritative decision by which the global community has expressed the community expectations with regard to sharing the use of the oceans in peace and with justice. It is necessary that we examine the past in order to understand the present and to put the future in perspective. In this context, Captain Swarztrauber has carefully defined his purpose: "to produce a history of the three-mile limit of territorial sea as a rule of international law."

This purpose is both timely and vital. It is in the delineation of the territorial sea that a coastal state's *exclusive* interest in the enjoyment of proximate waters and the *inclusive* interest of all states in the enjoyment of the world's oceans are subjected to the dynamic tension which produces both the challenge and the opportunity that faces the nations of the world today. Proper balance in the clarification interests will result in an inestimably greater production and wider distribution of potential values. Failure will witness the disintegration of common interest and a balancing in favor of special coastal interests and a rejection of common inclusive interests and sharing of values.

In international as well as municipal law, a page of history is of inestimable value. The author has provided for those who would reexamine the principles of the existing international legal order a historical perspective as the genesis of necessary change. If nations are to achieve the realization of their rational desires, they must place in context their national inclination to self-interest. They must examine their *exclusive* expectations and balance them with their *inclusive* interests in achieving a systematic means of developing and sharing potentially common goods with a minimum of conflict. It is particularly important

that those who profess to speak for emerging nations and who claim that they have had no say in framing existing principles understand that these fundamentals—maximum sharing, minimum monopoly—rational simultaneous use accompanied by minimal physical accommodation—are not the product of naked power but have derived from a concerned balancing of general community expectations in developing appropriate policies and criteria based upon that most effective implementing impetus for securing values—reciprocity.

This volume is a substantial contribution to the interdisciplinary literature of international law of the sea and will quickly become known as the definitive historical work on the three-mile limit. It not only treats the concept and issues of territorial seas from earliest times to the 1970s employing the three-mile rule of international law as its central theme but also step-by-step on all related problems identifies the community of interests dictating the growth or disintegration of the "law."

Prior to the 18th century, states fixed their seaward boundaries at a range of limits for various pragmatic purposes: range of cannon shot for neutrality, range of eyesight for security, and one or more marine leagues for fishing. During the late eighteenth century the French Foreign Office and Italian writers suggested that an all inclusive uniform limit of three miles might be more suitable. When forced in 1793 to proclaim a neutral zone in the war between England and France, the fledgling United States hurriedly and reluctantly adopted the three-mile limit as a temporary measure. Great Britain, perceiving the worldwide advantages that such a narrow international limit of territorial waters would afford to merchant, naval, and fishing fleets in general and her superior maritime enterprises in particular, adopted that limit for herself. Then with the consensus of the other major nations of the world, Britain championed the three-mile limit to its peak of acceptance as a rule of international law in the 1920s. Other claims were either abandoned or effectively suppressed. Only the Soviet Union, devastated by military defeat and civil war, diplomatically ostracized, and possessing no maritime strength, claimed a significantly greater extent—twelve miles.

During the interwar period there commenced a series of events and developments leading to the decline and demise of the three-mile rule. New interests and new understandings set in motion those factors which inevitably bring about change as man attempts to adjust to his new or better understood environment. World War II provided the vehicle for the return of

BOOK REVIEW

Russia as a great power. She reaffirmed her twelve-mile claim and many states followed suit. The United States' 1945 limited proclamation on the continental shelf triggered several Latin American states' general claims to 200 mile limits. The United States inherited Britain's role as champion of the three-mile limit but was not in a position to defend it as forcibly as the British. To challenge the Soviet twelve-mile claim and the Latin American 200-mile claims would have risked nuclear war on one hand and a disruption of the Inter-American System on the other. The felt necessities of the time dictated against the risk. Soon, almost universal international agreement had been replaced by an anarchic conflict-breeding situation with respect to the extent of the territorial sea. The all inclusive general three-mile limit was dead, having been superseded by a hodgepodge of special limits for special purposes.

Captain Swarztrauber carefully supports his findings with exhaustive documentation. The opinions of publicists; state practice (laws, decrees, and judgments); and international organizations (conferences, arbitrations, and tribunals) are marshalled for each historical period of the study. The three-mile limit is considered in terms of its effects on international relations between the maritime states and also from the standpoint of the domestic concerns both of seafaring and coastal states. It is not often that one can claim that any given piece of research is exhaustive without admitting that it is also exhausting. No such admission is necessary here.

The author draws several conclusions from his discussion. Two deserve special mention. First, if the current law of the sea anarchy—manifested by unilateral extensions of territorial sea to broad belts of previously shared resources—is to be overcome, it must be accomplished by the metamorphosis of some traditional relationships, particularly the relationship between the US and the USSR and the relationship between developed and developing states. As to the former, if the US and the USSR were to revert to the old patterns of power politics where each sought to exploit the volatile situation for her own advantage, an incessant and dangerous contest would arise which could dash the hopes of both nations and the world. These two nations must exercise restraint, recognize and accept the legitimate interests of the other, and negotiate realistically to accommodate conflicting views in a careful and unemotional effort to confront squarely the several issues which divide them. Furthermore, the technological "have" and "have nots" must likewise recognize their common interests in the oceans. If peace

is to be maintained, no nation should present another with the uncompromising choice between confrontation and acquiescence without regard to whether the situation is resource or security oriented. Second, the law of the sea represents probably more than any other facet of international discourse the multiple, complex and interrelated nature of modern world public order. If the limit of territorial seas is to have predictable permanency, it must be accompanied by a means of accommodating the interest of nations in renewable and nonrenewable resources, the security concerns of all and the ecologic expectations of the world. Captain Swarztrauber opts for a new narrow universal limit (12 nm) and the imposition of international regulation beyond this limit as the means of accomplishing this end. There are other viable options, of course, which, hopefully, the author will develop when he next contributes to the growing body of literature of this subject.

The Three-Mile Limit is carefully organized and supplemented by maps and other features so as to make it a most valuable research tool. It is enriched by concise and well chosen expression. It contains an analytical table of contents, a meticulously thorough index, several tables and diagrams, and probably the most complete bibliography on territorial waters ever published—almost 900 entries. The introduction includes a useful explanation of terminology unique to the delimitation of territorial seas, and throughout, sources are carefully identified.

I would be remiss in my duty to both author and audience if I did not briefly comment directly to the largely Army readers of this Review on the importance of oceans policy and the law of the sea to the security of the United States and to the Army's role in providing that security. We rely upon the sea to meet our global responsibilities. Our ability to resupply and reinforce depend in large measure upon the interworkings of the law of the sea. These issues are too broad and too important to be the exclusive province of any one Service. The security of the nation requires that the time and talent of a broad spectrum of attention be applied to this fundamental subject. The Army lawyers can and must make a significant contribution to the solution of these problems.

This book will be exceptionally valuable to a universal audience of students and readers at all levels concerned with maritime matters, international law and relations, and development of the resources of the sea. No serious practitioner or student can afford to neglect this valuable source of insight into the

BOOK REVIEW

history and development of the more fundamental policies of the law of the sea.

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